Supreme Court, U.S.
FILED

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Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH B. ZAMVIL,

Petitioner,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT, CHARLES CADMAN, SUPERINTENDENT, and DOES 1 through 50,

Respondents.

Petition for a Writ of Certiorari to
California Court of Appeal
First Appellate District,
Division Four

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. *The California Court of Appeal held that petitioner waived his right to be heard because he failed to object to governmental violations of his rights before signing a resignation and release. Petitioner was not allowed to prove that the government successfully concealed its violations from him. May a state court declare a waiver of the right to be heard because of an individual's failure to discover what the state has successfully concealed? Must a waiver of the right to be heard be knowing and informed?*

2. *California courts declared a waiver of petitioner's right to be heard while denying petitioner the opportunity to introduce evidence to disprove waiver. Must a state court allow an individual a meaningful opportunity to introduce evidence to prove the right to be heard?*

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Kenneth Zamvil, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeal of the State of California in and for the First Appellate District (A081951) entered in this matter on January 18, 2000.[1]

OPINION BELOW

The January 18, 2000 decision of the Court of Appeal of the State of California, First Appellate District, and the order of the Supreme Court of California on April 19, 2000 denying a Petition for Review, are reproduced in the appendix.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a right claimed under the Constitution of the United States. The petition is filed within 90 days of April 19, 2000.

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[1] All parties are named in the caption of the case.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV:
". . . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

STATEMENT OF THE CASE

A California school district secretly stripped Kenneth Zamvil of his rights and a California Court of Appeal held them forfeited when Zamvil failed to assert the constitutional and criminal violations which had been successfully concealed by the District. The facts we state are undisputed in the record unless otherwise indicated:

A. ZAMVIL'S SUSPENSION AND RESIGNATION

On March 2, 1992, petitioner, a tenured public school teacher was summarily suspended without pay by the Petaluma Joint Union School District (hereinafter "the District"). After completion of administrative discovery, the charges themselves were set for hearing on November 8, 1993. On October 25, 1993, however,

Zamvil's attorney withdrew (RT 207),[2] leaving Zamvil without representation at the mammoth upcoming hearing, where the two sides had plans for a hundred witnesses.[3] (RT 259, 489) Unable to obtain representation for the hearing on such short notice, and fearful of his chances without representation, Zamvil formally resigned on November 6, 1993. (RT 221, 278-279, 340-342, 344,429-430)

B. THE RESCISSION ACTION

Only after his resignation, Zamvil learned that the District had taken grossly unfair advantage of his predicament. On June 28, 1994, he filed suit to rescind the resignation contract, and for a declaration that the contract was void and unenforceable on account of duress, undue influence, fraud, and violations of due process of law. (JA 1-13) At Zamvil's May, 1996 trial, however, Zamvil was not allowed to prove the newly discovered evidence of the District's misconduct, or anything else that had occurred prior to the November, 1993 negotiations for his resignation.

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[2] The following abbreviations will be used to designate the record on appeal:

(RT): Reporter's Transcript (2 volumes, pages 1 through 563)

(JA): Joint Appendix (4 volumes, page 1 through 1077)

[3] The District planned to call 30 witnesses. Zamvil's prior counsel had plans to call 70-80 witnesses.

At the outset of trial and in the course of trial briefs, petitioner made an offer of proof with respect to the District's unlawful course of conduct (RT 4-49; JA 269-275, 380-397), and petitioner's offer of proof was repeated and restated on numerous occasions during the course of trial. (See below.) Further details of petitioner's offer of proof were made in his motion for new trial. (JA 601-602; 605-623) Each and every one of petitioner's offers were rejected. (RT 4-49, 61-62, 334-338, 389, 490, 516, 518; JA 543-544, 568-571, 778; see below.) A topical summary follows as to petitioner's offer and the evidence which the Court refused to hear.

C. THE HISTORY OF GOVERNMENTAL MISCONDUCT WHICH THE TRIAL COURT REFUSED TO HEAR

1. The August 14, 1990 Meeting

Without notice to Zamvil, and therefore in violation of the California Open Meeting Law, the Petaluma Joint Union High School District held an open public meeting about Kenneth Zamvil on August 14, 1990. (JA 382, 384-386) Complaints against Zamvil were specifically solicited. (RT 24, 335; JA 274) Students and parents were encouraged to foment complaints. (RT 4; JA 274) Students not in his classes and parents unknown to Zamvil were allowed to voice complaints. (JA 335, 384, 607) Though the meeting was tape recorded, and though a transcript of the meeting was prepared, and

provided to the District's investigator, Jack Fitzgerald, who later disclosed its contents to members of the public, petitioner has never been provided with a copy of the tape recording or of the transcript. (JA 382, 385, 614-621) Apparently, however, during the course of this meeting, and again without notice to him, petitioner was charged with immoral conduct. (JA 610)

2. The Unlawful Investigation

After the meeting, the Board conducted an unlawful, secret investigation to drum up and solicit complaints to steam-roll petitioner with false charges. (RT 4, 24, 27, 43, 376-377; JA 335, 385-388, 392, 621-622)

3. All Charges Resolved

On November 1, 1991, the Board again secretly met to discuss petitioner. Charges were again presented to the School Board without Mr. Zamvil's notification, presence, or knowledge. (RT 40, 61) Eleven days later, Zamvil was presented with a warning letter. (RT 43,45, 59; JA 388) Zamvil, however, addressed all the issues in this letter and modified his behavior to the satisfaction of his evaluator, James McGloin, the Principal of Casa Grande High School, and the Primary Evaluator of Mr. Zamvil. (RT 43, 45, 59, 61; JA 388) At this point in time, under the explicit terms of the Collective Bargaining Agreement between the District and its teachers, and

under the provisions of the Education Code, all issues between the District and Mr. Zamvil should have, *as a matter of California law*, been deemed successfully resolved. (JA 388)

4. The Unlawful 1992 Actions

On February 25, 1992, however, the District, meeting in closed session, again without notice to Zamvil, ignored both the Collective Bargaining Agreement and Zamvil's successful performance under its terms, and instead took action based upon the results of its secret investigation of complaints solicited by the Board back in August of 1990, despite the fact that the subject matter of these complaints were, as a matter of law, dead issues. (RT 40, 43; JA 388) Thus, on February 25, 1992, the Board, meeting in closed session, without notice to Zamvil, voted to suspend Zamvil without pay and initiate a process of dismissal. (RT 43) On March 2, 1992, Zamvil was therefore summarily suspended without pay with no notice or opportunity to defend himself and with no notice from his superiors or site evaluators of any misdeeds, shortcomings, or deficiencies in his conduct or teaching performance that had not been corrected. (JA 607-608)

5. The Multiple Violations of Law

The District's course of conduct over this seventeen-month period from August, 1990 through

March of 1992, violated the California Open Meeting Law (Government Code §§ 54950, 54957). (RT 24, 25, 43, 377; JA 607) The District's course of conduct also violated California Education Code § 44938, guaranteeing an employee the opportunity to remediate and overcome the grounds for charges. (RT 4, 27; JA 380, 381, 392, 609) The District also violated Petaluma School District Bylaw 9322, requiring notice to an employee of his right to elect an open or closed hearing of complaints. (RT 4, 25, 27, 38, 43; JA 385, 386, 392, 606, 609) The District also violated School Board Policy 1312(a), which prevents complaints from being heard by the Board until the teacher has been provided the opportunity to explain his behavior and resolve the problem through the Principal. (RT 4, 25-26, 27, 38, 43; JA 386, 392, 606, 609) The District also violated the District's Collective Bargaining Agreement which requires that complaints be first addressed to the teacher, and prohibits Board action until a number of progressive resolution procedures have first been exhausted. (RT 4, 27, 38, 43; JA 386-387, 606, 609-610)

6. Charges Designed to Deprive Zamvil of His Civil Rights

The charges against Kenneth Zamvil were artfully contrived to deprive Zamvil of his civil rights. Thus, at the time of his March 2, 1992 dismissal, Zamvil was presented with a list of 41 false charges that had been

approved by the Board in closed session, without notice to him. (RT 4-5, JA 608) Along with the list of false charges, he was presented with fourteen (14) transcribed statements from underachieving students and a number of parents whose statements had been tape recorded by the District's investigator, Jack Fitzgerald. (JA 608) Thereafter, approximately eleven (11) additional Fitzgerald transcripts were forwarded to Zamvil and an additional twenty (20) false charges were levied against him. (RT 4-5; JA 608)

At all times, the District and its attorneys have maintained that these charges against Zamvil were scrupulously based on the transcripts of the Fitzgerald investigation. (RT 515; JA 451, 608-609) While the transcripts do not support the allegations and in many cases actually refute the charges, many of the charges are composed in intentionally mis-descriptive, inflammatory language.[4] (RT 517-518; JA 609, 615-621) The immoral conduct charges all appear to arise out of the secret August 14, 1990 Board of Education hearing for which the District still refuses to provide Zamvil a transcript. (JA 610, 615-621)

Zamvil requested that his Collective Bargaining Unit defend him. Like Zamvil, however, the Collective

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[4] In the most obvious abuse of discretion, the trial court found that the 61 charges are based on the Fitzgerald transcripts. (JA 539) The trial court, however, refused to take evidence on this issue. (RT 517-518)

Bargaining Unit was unaware of the Board's illegal activities. The Board's secret events were not noticed to the Collective Bargaining Unit. (RT 38) Consequently, the Unit informed Mr. Zamvil that inasmuch as the District charges included allegations of immoral conduct, the procedural protections of the Collective Bargaining Agreement, Board Policy 1312(a), and Bylaw number 9322 did not afford him protection. (JA 609) The District specifically included the charges to deprive Zamvil of his civil rights under California Education Code § 44938, the Collective Bargaining Agreement, Board Bylaw 9322 and Board Policy 1312(a). (RT 4, 45, 387-389, JA 609-610) Had immoral conduct charges not been included, Zamvil would have been entitled to written notice of the complaints and "opportunity to correct his or her faults and overcome the grounds for such charge." California Education Code § 44938. Zamvil also could not have been immediately suspended, and certainly not without pay. (JA 610)

7. Fraud and Perjury by the District During Administrative Discovery

Petitioner's March 1992 dismissal and the entire administrative proceedings were thus secretly based upon complaints unlawfully solicited by the District during the illegal August 1990, November 1991, and February 1992 meetings and the unlawful investigations which arose out of those unlawful meetings. (RT 24,40,43; JA

335, 388, 610, 615-621) As a proximate result of the conspiracy to deprive him of his civil rights, petitioner, however, was not privy to these concealed facts at the time he signed the November 6, 1993 resignation and release. (RT 9, 15, 21, 22, 23, 26, 38, 47, 335, 376-377; JA 391-392, 615-621) Throughout the administrative process, and during the course of administrative discovery, the District actively concealed its wrongdoing, its California Open Meeting Law violations, as well as its violations of District Bylaws and District Policies. (RT 9-15, 240; JA 274, 337, 391-392, 394, 621) Indeed, Zamvil was falsely advised by the District that the open Board meetings in question were closed sessions and that he was not entitled to information regarding the proceedings. (RT 9, 21-22, 34; JA 274, 392, 612) This lie was used to deny Zamvil a copy of the transcript of the tape recorded August 14, 1990 meeting. (JA 615) Public records of the meeting were also falsified by the District. (RT 25; JA 392, 621) District Superintendent Cadman also committed perjury during administrative discovery (JA 392, 621), falsely testifying that the August 1990 Board hearing was closed and not agendaed in order to prevent petitioner from obtaining a tape recording of the proceedings. (RT 34; JA 274, 391-392, 615) These concealments by the District of its wrongdoing effectively made it impossible for Zamvil to discover the District's wrongdoing prior to signing the resignation and release. (JA 391-392) Indeed, it was not until Superintendent Cadman's deposition in the

instant action, shortly before trial, that it was revealed that the August 14, 1990 hearing was an open public meeting. (RT 34-38)

D. THE TRIAL COURT DECISION

Having excluded more than ninety percent of Zamvil's case, *in limine,* the trial court duly found that the elements of rescission were not proved and denied petitioner's entire complaint. (JA 541-543, 574)

E. OPINION BELOW

Petitioner took an appeal to the California Court of Appeal. His Opening Brief identified seventeen violations of his rights by the District, all of which were unknown to him at the time he entered into the resignation agreement:

(1) The District intentionally drummed up false complaints for the purpose of steam rolling Zamvil in violation of state law and local Bylaws and Policies;

(2) Encouraged students to foment false complaints against him;

(3) Held unlawful secret meetings, without notice to him for the purpose of depriving him of his civil rights;

(4) Breached the Collective Bargaining Agreement;

(5) Violated California Education Code § 44938;

(6) Violated Board Policy 1312(a);

(7) Violated Board Bylaw 9322;

(8) Violated the California Open Meeting Law;

(9) Falsely charged him with immoral conduct in order to deprive him of his civil rights;

(10) Suspended him without pay in violation of law;

(11) Falsified public records to deprive him of his civil rights;

(12) Committed perjury to deprive him of his civil rights;

(13) Concealed public records to deprive him of his civil rights;

(14) Unlawfully failed to produce relevant documents during the course of administrative discovery;

(15) Concealed the factual basis for the charges brought against him;

(16) Concealed illegal conduct to deprive him of his civil rights;

(17) Based the charges brought against him on information obtained during the course of an illegal Board meeting.

The Court of Appeal acknowledged Zamvil's offer to prove this egregious misconduct by the District, but discounted it as "too remote in time to affect Zamvil's

consent to the resignation agreement." (Opinion at A-5)[5] By the Court of Appeal's view, Zamvil waived objection to the secret violations of his rights since he "had plenty of time to investigate and take action within the administrative proceedings with respect to all the purported violations. Copies of interview transcripts from the interviews with parents and students that Fitzgerald elected to tape-record were given to Zamvil. His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding." (Opinion at A-6)

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD DECIDE THAT A WAIVER OF THE RIGHT TO BE HEARD MUST BE KNOWING AND INFORMED

What petitioner offers to prove to any court that will hear his case reads like the Story of Job. Wrong upon wrong was heaped upon him by the District. Sixty-one false charges. Suspension of pay. Perjury. Falsification of records. Massive denials of due process. And all times Zamvil was kept in the dark. Yet California courts will not even hear the evidence.

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[5] Page references are made to the pagination provided of the Opinion of the Court of Appeal as it appears in the Appendix.

Fraudulent and criminal misconduct by the government as an employer violates the Bill of Rights and the Fourteenth Amendment. The employment relationship, the administrative hearing process, and settlement agreement itself, must of necessity satisfy the requirements of due process of law. *Gilbert v. Homar* 520 U.S. 924 (1997); *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985); *Board of Regents of State College v. Roth* 408 U.S. 564, 578 (1972); *Perry v. Sindersmann* 408 U.S. 593, 602-603 (1972).

The California Court of Appeal found that Zamvil waived his right to be heard concerning the District's violations of his rights because he "had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. Copies of the interview transcripts from the interviews with parents and students that Fitzgerald elected to tape-record were given to Zamvil." (Opinion of the Court of Appeal at A-6)

Zamvil, however, consistently offered to prove that he didn't know his rights had been violated at the time he signed the agreement. (RT 9, 15, 21-23, 26, 38, 47, 334-338, 376-377, 386-389; JA 391-392, 614-621) At trial, he alleged criminal misconduct by the District and its Superintendent, during the 18-month period, to prevent him from discovering that he had been stripped of his rights. (RT 38, 240, 386-389; JA 274, 391-392, 621) Thus, of the seventeen instances of governmental misconduct (Opinion of the Court of Appeal at A-5)

alleged by Zamvil, six refer to concealed misconduct operating up to the date of the agreement:

1. Falsification of public records to deprive him of his civil rights;
2. Perjury to deprive him of his civil rights;
3. Concealing public records to deprive him of his civil rights;
4. Unlawful failure to produce relevant documents during the course of administrative discovery;
5. Concealing the factual basis for the charges brought against him;
6. Concealing illegal conduct to deprive him of his civil rights.

As for the transcripts of the interviews with parents and students given to Zamvil, it has never been suggested that these transcripts provided notice of the District's misconduct. Zamvil, indeed, offered to, but was not allowed to prove, that the charges against him were not based on the transcripts (RT 517-518; JA 609, 615-621) and that the core of the immoral conduct charges against him arose out of the secret August 14, 1990 Board of Education hearing for which the District still refuses to provide Zamvil a transcript. (JA 382, 385, 610, 614-621) Viewing this case in terms of what petitioner offered to but was not allowed to prove, the decision of the California Court of Appeals stands for the proposition that government can secretly strip an

individual of his rights and hold them waived when the individual fails to assert that which is unknown to him.

Clearly, this is not and cannot be the law of the United States. The right to be heard is "one of the most fundamental aspects of due process." *Shroeder v. New York City* 371 U.S. 208, 212 (1962) ; *Accord, Armstrong v. Manzo* 380 U.S. 545,551 (1965). This core requirement of due process is premised upon non-concealment by one's adversary. "The right to be heard has little reality or worth unless one is informed . . . ." *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 314 (1950).

The concept of waiving government fraud is new to this Court. Cf. *Whitmore v. Arkansas* 495 U.S. 149,173 (1990) (dissenting opinion) (one cannot consent to patently unconstitutional conduct). Even private individuals, who are not bound by constitutional duties, have not been allowed to deal in this fashion when far less than the right to be heard concerning fundamental rights is at stake. For more than 100 years, this Court has espoused the rule that waiver may not be claimed by one who has a duty to disclose the true facts, but has failed to do so. *Insurance Company v. Wolff* 95 U.S. 326, 333 (1877); *Northern Assurance Company v. Grandview Building Association,* 183 U.S. 308, 357 (1902). "To permit such concealment . . . would tend to sanction a fraud." *Insurance Company v. Wolff, supra,* 95 U.S. 326 at 333.

No lesser standard may apply to government violations of constitutional rights. As this Court held in *Thorpe v. The City of Durham* 368 U.S. 670 (1967), in connection with a tenancy relationship between an individual and a city housing authority,

> "[I]t is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the action of the government are circumscribed by the Bill of Rights and the Fourteenth Amendment." *Id.* at 678

As for waiver, the waiver standards set forth in the decisions of this Court deserve further clarification. In *Brady v. United States,* 397 U.S. 742, 748 (1970), involving the entry of a guilty plea, this Court espoused an expansive view:

> "Waivers of constitutional rights not only must be voluntary but must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

While a number of subsequent decisions of the Court apply this standard — or a variation of it — none specifically adopt *Brady's* expansive all-constitutional-right viewpoint. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (right to remain silent and right to presence of an attorney during questioning); *Whitmore v. Arizona,* 495 U.S. 149,165 (1990) (right to appeal death sentence); *Godinez v. Moran* 509 U.S. 389, 398-400

(1993) (right to counsel); *Wyrick v. Fields,* 459 U.S. 42, 45-49 (1982) (waiver of Fifth Amendment to take polygraph test).

Waiver of certain constitutional rights, however, have required less of a showing. Thus the government need not prove that defendant who consented to a search knew that he had the right to withhold his consent. *Schneckloth v. Bustamonte* 412 U.S. 218, 227-233 (1973). Even when less of a showing is required, however, this Court has held that consent which is based upon government supplied misinformation is no consent at all. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968) (no consent where search allowed after officer said he had a warrant, but warrant was invalid)

While no decision of this Court has yet held that the *"voluntary, knowing, intelligent"* standard applies in the civil area, where property interests, as opposed to personal liberty are at stake, at least one pre-*Brady* decision makes it clear that there can be no consent to the loss of fundamental rights without a warning that fundamental rights are being lost. *Ohio Bell Telephone v. Public Utilities Commission of Ohio* 301 U.S. 292, 306 (1937) (Cardozo, J.) "We do not presume the acquiescence in the loss of fundamental rights." *Id.* at 307.

At least two post-*Brady* decisions of this Court have also applied, if not embraced, the "voluntary, knowing, intelligent" waiver standard in reaching dispositions. Thus, in *Overmeyer v. Frick* 405 U.S. 174

(1972) this Court upheld a *cognovit* provision of a contract on the ground that Overmeyer Corporation "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences." *Id.* at 187 In *Fuentes v. Shevin* 407 U.S. 67, 95 (1972) this Court rejected a *cognovit* provision because of evidence of unequal bargaining power, and because there was no showing that the aggrieved party was made aware of the fact that he was waiving constitutional rights. "For a waiver of constitutional rights must, at the very least, be clear." *Id.*

While the more recent decisions by this Court in both the civil and criminal area appear to retreat from *Brady's* expansive view, they nonetheless provide a glimpse of a possibly greater precision in this Court's future announcements concerning waiver. Thus Justice Scalia in his concurring opinion in *Freytag v. Commissioner* 501 U.S. 868 notes that what is sometimes referred to as waiver is actually forfeiture, "the failure to make a timely assertion of a right." *Id.* at 895, n.2. Waiver, by contrast, is the "'intentional relinquishment or abandonment of a known right.'" *United States v. Olano* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst* 304 U.S. 458, 464 (1938). "'[A] constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right . . .'" *Id.* (quoting *Yakus v. United States* 321 U.S. 414, 444 (1944))

United States v. Olano, supra, 507 U.S. at 733 also adumbrates a standard for evaluating the level of scrutiny which must be applied for declaring or upholding a waiver:

> "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choices must be particularly informed or voluntary, all depend on the right at stake."
> Accord, *New York v. Michael Hill* 120 S.Ct. 659, 664 (2000).

While the recent waiver decisions of this Court move in a direction of greater precision, at least in the criminal area, the Court has paid only rare attention to the issue of the waiver of fundamental civil rights, the extent to which due process applies to waiver claims by the government, and the circumstances under which the government can be estopped from claiming waiver. The unexamined decision of the Court of Appeal in this case, and the vagueness of most claims, and many findings, of waiver bear witness to this. Waiver, meanwhile, is a dominant part of the landscape of twenty-first century life. One cannot install software, buy stock online, obtain a credit card, open a bank account, see a doctor, get at a job, lease a car, or even park a car without waiving one's rights. Modern business entities and government daily confront one with waivers to sign. See, e.g., *Wright*

v. Universal Maritime Service 525 U.S. 70 (1999) (collective bargaining agreement); *Walters v. Reno* 145 F.3d 1032 (9 Cir. 1998) cert. den. 526 U.S. 1003 (confusing INS waiver); *Circuit City Stores v. Adams* 194 F.3d 1070 (9 Cir. 1999) (cert. granted May 22, 2000, 120 S. Ct. 2004; 146 L. Ed. 2d 939) (waiver signed by employees agreeing to submit all disputes to arbitration).

Petitioner submits that this Court can and should establish that concealed and unconscionable conduct by the government against its employee simply can't be waived. This Court should also make it clear that a waiver of the right to be heard must be voluntary, knowing, and intelligently made.

II

THIS COURT SHOULD ESTABLISH THE EXTENT TO WHICH A STATE COURT CAN DENY AN INDIVIDUAL AN OPPORTUNITY TO PRESENT EVIDENCE TO PROVE THE RIGHT TO BE HEARD

The California Court of Appeal denied Zamvil an opportunity to prove his case by finding that the seventeen categories of misconduct by the District were "too remote in time to impact Zamvil's consent" and that Zamvil "waived" his objections by not raising them prior to entering into the contract. (Opinion of California Court of Appeal at A-6) Both findings were contrary to Zamvil's offer of proof and without the benefit of any evidence.

As for the "remote in time" unlawful charges, they were not remote the morning Zamvil signed the resignation agreement. Having lost his representation at the upcoming hearing, the charges were a gun to his head. Zamvil offered to prove this full-fledged impact. He offered to prove the District's violations were from the outset designed to "steamroll" him. (RT 9-16, 21-24, 26-27, 31, 34, 38, 40, 43, 47; JA 2-3, 274,611- 612, 617-622) He offered to prove that during the 18 months of the administrative prosecution, up to and including the final day of his resignation, he suffered *without pay*. (RT 43, 607) At trial, he alleged *criminal* misconduct by the District and its Superintendent, *during the 18-month period*, right up to the date of his resignation, to prevent him from discovering that he had been stripped of his rights. (RT 38, 240, 386-389; JA 274, 391-392, 621) He consistently claimed that his will was broken by the District. (JA 5-6, 8, 613; RT 279, 309, 354, 355, 363-364)

As for the claimed "waiver", as noted in our first argument (*ante* at 14), at every stage of trial and appeal Zamvil offered to prove that criminal misconduct by the District and its Superintendent successfully prevented him from discovering that he had been stripped of his rights. (RT 38, 240, 386-389; JA 274, 391-392, 621)

These factual questions underlying petitioner's right to be heard were matters for the trier of fact in the first instance. The right to present evidence is essential to the fair hearing required by the due process clause.

Jenkins v. McKeithen 395 U.S. 411, 429 (1969). Court of Appeal findings are not a substitute for a hearing where the evidence is unknown. *Garner v. Louisiana* 368 U.S. 157, 173 (1961). As Justice Cardozo wrote for this Court , where important rights are at stake, there must be a "'suitable opportunity through evidence and argument . . . to challenge the result.'" *Ohio Bell Telephone v. Public Utilities Commission of Ohio* 301 U.S. 292, 305 (1937) (citation omitted) Proofs cannot be "drawn from clouds." *Id.* at 306.

This is especially the case when the issue at hand concerns waiver of the right to be heard concerning government misconduct. Presuming waiver of a fundamental right from inaction or a silent record is impermissible. *Barker v. Wingo,* 407 U.S. 514, 525-526 (1972) "Indeed, in the civil no less than the criminal area, 'courts should indulge every reasonable presumption against waiver,'" *Fuentes v. Shevin* 407 U.S. 67, 95 (1972) (quoting *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937)).

> "The determination of whether there has been an intelligent waiver (of a fundamental right) must depend, in each case, upon the particular facts and circumstances surrounding that case . . . ." *Johnson v. Zerbst,* 304 U.S. 458, 464.

One cannot presume waiver of the right to be heard simply based upon inaction during a passage of time while the government sits on the evidence.

> "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to prove that it is untrue." *Greene v. McElroy* 360 U.S. 474, 496.

As immutable as these principles may seem, this Court has not yet had the opportunity to apply or explicitly extend them to the decisions of state courts engaged in the exercise of their civil statutory and common law jurisdiction. Nonetheless,

> "the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Shelley v. Kramer* 334 U.S. 1, 17(1948).

Many basic questions deserving decision are therefore raised by California's refusal to hear evidence of non-waiver. Under what circumstances must a state court allow an individual an opportunity to present evidence to prove a right to be heard? Must state courts "indulge every reasonable presumption against waiver" of certain rights? *Fuentes v. Shevin* 407 U.S. 67, 95

(1972). Or can they establish an irrebuttable presumption of waiver based upon the failure to assert a right during a particular period? May such a policy be applied where the due process rights of public employees are at issue? See, e.g., *Gilbert v. Homar* 520 U.S. 924 (1997); *Cleveland Board of Education v. Loudermill* 470 U.S. 532 (1985). Does an affected individual have the right to prove that waiver may not be claimed by the government when it has a duty to disclose the true facts, but has failed to do so? *Insurance Company v. Wolff* 95 U.S. 326, 333 (1877); *Northern Assurance Company v. Grandview Building Association,* 183 U.S. 308, 357 (1902).

Petitioner requests the Court to grant the petition to throw light upon these issues and to establish the extent to which a state court must provide an individual an opportunity to introduce evidence to prove the right to be heard.

CONCLUSIONS

This Court has paid rare attention to the issue of the waiver of fundamental civil rights, the extent to which due process applies to waiver claims by the government, and the circumstances under which the government can be estopped from claiming waiver. Waiver, meanwhile, has become a dominant part of the landscape of twenty-first century life. Someone who doesn't want to sign a waiver might better live on an island.

This Court can and should establish that some things cannot be waived under our Constitution. This Court can and should make clear that a waiver of the right to be heard must be voluntary, knowing, and intelligently made, and a finding itself based upon a due process opportunity to be heard.

For these reasons, a Writ of Certiorari should be granted.

Dated: July 18, 2000

Respectfully submitted,

JOSEPH BAXTER,
Attorney for Petitioner

IN THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

KENNETH B. ZAMVIL,

Plaintiff and Appellant,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT, et al.

Defendants and Respondents.

FILED:
JANUARY 18, 2000

No. A081951
Sup. Ct. No. 208215

Appellant Kenneth B. Zamvil appeals from the judgment in favor of respondents Petaluma Joint Union High School District (District) and its superintendent, Charles Cadman, on his action for rescission of contract and other relief. We affirm the judgment.

I. BACKGROUND

After 19 years of service as a science teacher at Casa Grande High School in respondent District, on March 2, 1992, the

board of education suspended Zamvil pending final disposition of numerous charges of misconduct. The charges included allegations of multiple occasions of (1) saying or doing things that were offensive to female students (2) taking class time to discuss matters involving his personal life; (3) making inappropriate statements to students that raised questions about the integrity of his grading system; (4) starting class late; and (5) touching or hitting students in inappropriate ways. The board issued amended charges – for a total of 61 allegations of misconduct – on February 23, 1993. James Bertoli represented Zamvil from approximately mid-March 1992 until October 25, 1993.[1] Thereafter the California Teachers Association (CTA) appointed Priscilla Winslow to represent him for the limited purpose of arguing for a continuance of the administrative hearing set for November 8. The motion to continue was heard on Wednesday, November 3. The administrative law judge denied a continuance.

After the hearing, Robert Henry, chief counsel for the District, disclosed to Winslow that the District had a potential new charge. Several days earlier, Jack Fitzgerald, the investigator retained by the District, reported that one of Zamvil's former students alleged that Zamvil had used drugs in his presence. A day or two later Henry had a further conversation with Winslow and faxed her a corroboration in the form of declarations in a civil action that indicated Zamvil's drug usage. Apparently the student's information was 10 years old, but Henry was of the opinion that there was precedent to circumvent the 4-year statute of limitations for disciplinary actions against certificated teachers.

Settlement negotiations ensued. Zamvil had the assistance of Bertoli as well as Steve Gallenson during this process. Gallenson testified that he began acting as temporary counsel to

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[1] All further dates are in the 1993 calendar year unless otherwise specified.

Zamvil around October 28, in order to facilitate the settlement process. During this time frame Bertoli was also meeting with Zamvil and discussed settlement with Margaret Merchat, another attorney in the District's legal department. Merchat prepared the initial draft. Revisions were proposed, and made, to accommodate Zamvil with respect to the effective date of his resignation and the type of reference the District would give to prospective employers.

In order to cancel the administrative hearing set for Monday, November 8, the District required that the resignation agreement be executed by the close of business on Friday, November 5. The District was looking at calling approximately 30 witnesses in the event the hearing went forward. Zamvil, however, was out of town on a teaching assignment, so Attorney Gallenson signed the resignation agreement for him on Friday; Zamvil executed it in person on Saturday. The District in turn cancelled the proceeding.

Seven months later Zamvil filed his action for rescission of the resignation agreement on account of duress, undue influence and fraud. The trial court granted the District's motions to exclude evidence that the school board meetings leading up to the misconduct charges, as well as the ensuing investigation, were improper. Following a six-day bench trial, the court entered judgment denying Zamvil any relief. Likewise, the court denied Zamvil's motion for a new trial. This appeal followed.

II. DISCUSSION

A. Law of Rescission

Civil Code[2] section 1689 sets forth grounds for unilateral

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[2] All further statutory references are to the Civil Code unless otherwise specified.

rescission. These include cases where "the consent of the party rescinding…was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds…" (*Id.* At subd. (b)(1).) And even where a transaction is free from fraud, duress or undue influence, a contract can be rescinded "[i]f the public interest will be prejudiced by permitting" it to stand. (*Id.* At subd. (b)(6); *Grimes* v. *Allen* (1949) 93 Cal.App.2d 653, 656.)

Duress consists of unlawful or fraudulently obtained confinement of a person, his or her relatives or property which causes the person to consent to a transaction out of fear. (See §1569; *Odorizzi* v. *Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.) The related doctrine of economic duress has been recognized as a basis for rescinding a settlement agreement. However, in light of the notions of protecting the freedom of contract and according finality to private dispute resolutions, courts are reluctant to set aside settlements. Thus, they apply the economic duress doctrine in limited circumstances, as a "'last resort.'" (*San Diego Hospice* v. *County of San Diego* (1995) 31 Cal.App.4th 1048, 1058.) The doctrine comes "into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc.* v. *Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158.) Economic duress as a ground for rescinding a contract is thus a tool to correct "the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value." (*Id.* At p. 1159.)

By definition undue influence includes "taking an unfair advantage of another's weakness of mind." (§1575, subd. 2) or "taking a grossly oppressive and unfair advantage of another's necessities or distress" (*Id.* at subd. 3). Factors to be considered in determining whether there was "undue influence" include '"the

unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded.'" (1 Witkin, Summary of Cal.Law (9th ed. 1987) Contracts, § 423, p. 380, quoting Rest.2d Contracts, § 177, com.b.)

Actual fraud involves conscious misrepresentation, concealment or false promises which induces another to enter a contract. (§ 1572; *Odorizzi v. Bloomfield School Dist., supra*, 246 Cal.App.2d at p. 128.) Constructive fraud "'comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another.'" (*Barrett* v. *Bank of America* (1986) 183 Cal.App.3d 1362, 1368-1369.)

B. Scope of Relevant Evidence

Zamvil has outlined a list of 17 purported instances of "egregious conduct" by the District in hearing initial allegations of misconduct from parents, conducting related actions leading up to his discharge and initiating and carrying out the underlying investigation. These run the gamut from drumming up complaints, falsifying records, concealing information and committing perjury to breaching the collective bargaining agreement to violating the Education Code, the Brown Act and board policies and bylaws.

Zamvil contends the trial court erred in ruling that evidence relating to this alleged misconduct was irrelevant to his rescission action. He argues, for example, that the November 1993 resignation agreement "was inextricably tied" to the District's behavior which he variously describes as amounting to economic duress, undue influence, constructive fraud and a violation of public policy, "**Had the District followed the law**," he argues in his opening brief, "**there would not be a resignation and release**." (Original bold-faced type.) The ruling was proper.

With these and similar statements, Zamvil consistently has tried to connect the events and processes leading up to the filing of charges – including the District's basis and preparation of the misconduct charges – with the execution of the resignation agreement itself. The problem with this analysis is that duress, undue influence and fraud all go to whether or not Zamvil freely consented *to the agreement.*

To begin with, the investigation process and what it revealed as well as the District's practices, actions and procedures in hearing the initial complaints and developing the statement of charges were too remote in time to impact Zamvil's consent to the resignation agreement. More than 18 months had elapsed from the initial filing against Zamvil and the settlement. The district's conduct occurring up to initiation of the administrative proceeding was highly pertinent to the outcome of *that* proceeding. Zamvil had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. Copies of interview transcripts from the interviews with parents and students that Fitzgerald elected to tape-record were given to Zamvil. His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections. This includes the objection based on violation of public policy because again, that objection goes to events predating the settlement negotiations.

Similarly, the trial court properly excluded as irrelevant the testimony of James McGloin, retired principal of Casa Grande High School. McGloin retired in 1993 and was not involved with events surrounding the resignation agreement. McGloin, as site administrator, had evaluated Zamvil's teaching performance. And although his testimony might have been relevant at the administrative hearing on the validity of the charges against

Zamvil, the trial court had it right in ruling that McGloin had nothing relevant to offer on "whether or not there was some [overreaching] or concealment at the time of the entry of the contract."

C. *Necessities and Distress*

Zamvil also complains that the trial court wrongfully prevented him from putting on proof of his necessity or distress, a necessary element of a claim of undue influence pursuant to section 1575. According to Zamvil, the trial court erroneously excluded relevant evidence concerning "his *in pro per* status, lack of informed and prepared counsel during settlement negotiations and, on the eve of a lengthy and complex administrative trial, his inability to find alleged drug witness Johnson, and his own distressed mental state." (Original italics.) The trial court's evidentiary decisions were sound.

1. Representation During Settlement

First, as to the status of Zamvil's representation during the settlement process, we note that the trial court was well aware of the situation, pointing out the following pertinent facts in its summary of facts: "Throughout the administrative proceeding, Plaintiff was represented by six attorneys, most specialists in teacher labor matters. (There was a period of about one week when the School District did not know whether Plaintiff was represented by counsel.) Plaintiff's principal attorney was Mr. Joseph Bertoli until October 25, 1993, when he withdrew from plaintiff's case. [¶]... (Plaintiff filed the motion [to continue] in pro per.)" (Original underscore.)

Second, although it appeared to the District that Zamvil was without representation during the period spanning October 25

– when Mr. Bertoli withdrew – and November 4, in fact both Bertoli and Gallenson consulted with Zamvil during the period leading up to the November 5 settlement agreement. Moreover, Gallenson testified that he commenced "temporary" representation of Zamvil on October 28 for purposes of facilitating execution of the resignation agreement. Additionally, Winslow specially appeared to argue the motion to continue the administrative hearing. Finally, all of these lawyers were experienced in teacher labor relations matters.

Bertoli of course was amply informed about the case, having represented Zamvil since March 1992. Bertoli and Merchat, on behalf of the District, discussed settlement and touched on the "general terms of the settlement agreement." Merchat provided Bertoli with a draft of the settlement agreement on November 4; Bertoli met with Zamvil and his wife that evening about an ex parte matter. Merchat provided him with a draft of the settlement agreement and she made changes based on discussions with both Bertoli and Gallenson.

Gallenson first became aware of Zamvil's situation earlier in 1993 when Zamvil provided him with several transcripts of student interviews. By November 5 he had examined the amended statement of charges, as well as some student interviews and a deposition. According to both Merchat and Henry, Gallenson seemed familiar with the case. Merchat had settlement discussions with Gallenson, confirmed in a faxed memorandum. Gallenson also had settlement conversations with chief counsel Henry, including a candid discussion about Henry's assessment of the strength of the case. As well, both Merchat and Henry discussed with Gallenson the issue of conveying information about the underlying charges to the California Commission on Teacher Credentialing (CCTC), notwithstanding Zamvil's resignation.

Gallenson also told Merchat he had authority to enter into a resignation agreement on behalf of Zamvil. He faxed the agreement to Zamvil on the afternoon of November 4 and spoke with Zamvil "a number of times" during the week before they signed the agreement on November 5 (Gallenson) and November 6 (Zamvil). According to Zamvil's testimony, he did not claim that Gallenson inadequately advised him concerning the terms of the resignation agreement before Gallenson signed it on his behalf. Moreover, Gallenson testified to his own understanding of all aspects of the agreement.

In addition, although Winslow played a lesser role, she, too, was involved in settlement discussions. For example, Winslow discussed with Henry what type of recommendation the District would provide to prospective employers. As well, they covered the merits of the case from Henry's perspective, allegations of drug use by a former student and the issue of relaying information to the CCTC. Henry faxed to her several declarations filed in Zamvil's dissolution action that indicated drug use on his part.

Thus, contrary to Zamvil's assertions, the record demonstrates that Zamvil had the assistance of competent, informed counsel during the settlement process.

2. Representation at the Administrative Hearing

Zamvil argues nonetheless that his distress was compounded by the fact that he did not have an attorney to represent him in the upcoming administrative hearing, and the court did not allow Gallenson to testify that he had a calendar conflict. First, the court cut-off this testimony on relevancy grounds because Gallenson had just testified that he made a special appearance in the case. Second, when asked whether his representation in the administrative proceeding was conditioned on

the administrative law judge granting a continuance, Gallenson asserted the attorney-client privilege. Then, after the court prodded him to just "[t]ell us what your relationship to the plaintiff was in this case," the question of a conditioned representation was reasserted and Gallenson gave a nonanswer. Third, Zamvil himself wrote to the administrative law judge on November 4 that he had Gallenson's tentative agreement to represent him at the administrative hearing. Zamvil testified that the tentative agreement was "[c]onditioned upon getting a continuance."

Further, Zamvil moved for a continuance in the administrative proceeding and in superior court; both motions were denied. The denials of continuance by the administrative law judge and the superior court[3] on November 3 and November 5 respectively are not a basis for rescission. As the trial court indicated, if Zamvil felt he could not go forward without a continuance, he should have sought a writ before November 8. Although it would have been tight, a writ petition could have been prepared in advance and filed immediately after the November 5 denial of continuance or stay. Zamvil had the assistance of counsel during this period. It was up to them to advise Zamvil of these procedures prior to signing the resignation agreement.

3. Drug Use Allegations

Zamvil further asserts that the court wrongfully precluded testimony about "one of the most distressing of circumstances. The court would not let plaintiff testify that Johnson's name was given to him on November 3, 1993, as a witness who would come forth and testify that Zamvil used drugs with a student... Nor was

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[3] Although we do not have copies of anything relating to the November 5 ex parte hearing in superior court, it appears from the briefs that the hearing was on a motion for either a continuance or a stay.

he allowed to testify that he had no means of finding Johnson." Contrary to this assertion, both Merchat and Zamvil testified to Zamvil's knowledge of Johnson as a potential witness on November 3. Additionally, as to the objection that the court impermissibly prevented Zamvil from testifying that he had no means of locating Johnson, Merchat testified that neither Bertoli nor Gallenson nor Zamvil ever requested the identity of the District's drug witness.[4] Moreover, Bertoli told Merchat *not* to obtain a statement from Johnson, the inference being that such information would have to be made available to the CCTC. Finally, Zamvil was permitted to testify that he had "[v]ery great concern" about introducing evidence at the administrative hearing related to alleged drug use. He explained that such evidence, true or false, would end up being very prejudicial and he would end up "losing the credential..." He said when he heard about Johnson as a potential witness, he became upset, the news "sent me into a panic..." He was frantic "[t]hat somebody could come up with this outrageous stuff." This development caused him to lose sleep.

Henry shared his thinking about the possibility of introducing the drug use information at trial with both Winslow and Gallenson, even though the allegations went to conduct occurring beyond the four-year statute of limitations. Henry indicated he was assessing whether to amend the statement of charges, pending further research and review of the information. The statement of charges was never amended. If Zamvil and the attorneys assisting him thought that a continuance was needed to conduct further discovery in light of the potential new witness, a continuance for good cause could have been sought in the administrative proceeding itself. (See Gov. Code, § 11524.) No one sought a continuance on this basis and Zamvil cannot now

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[4] Apparently Winslow asked Henry if he could identify the student by name, but Henry did not know the name at the time.

complain about the timing of the dismissal hearing vis a vis learning of the potential student witness.

D. Best Evidence

Investigator Fitzgerald made notes of his interviews with ex-student Johnson. Johnson testified that Fitzgerald asked him to review those notes and sign a statement verifying their accuracy. Johnson wanted to make some changes to the notes and add a statement. Johnson testified that he asked Fitzgerald if he would leave the statement for him to review, and asked if could modify it; Fitzgerald refused. To get rid of Fitzgerald, Johnson signed a statement verifying the accuracy of the notes on condition that Fitzgerald verify one point and revise a section of the notes that Johnson thought posed a question, but did not include his response. The areas of inaccuracy had to do with Zamvil being at a party, and smoking cocaine or marijuana.

Counsel for Zamvil asked to have Fitzgerald's notes produced as the best evidence of their contents. The trial court denied the motion. Counsel renewed the request when the District asked Fitzgerald whether Johnson asked for certain changes to the notes before verifying their accuracy. Zamvil now charges that the trial court erred to his prejudice in failing to order the notes produced at trial. We disagree.

First, the best evidence rule (now the secondary evidence rule[5]) is only concerned with proof of the contents of a written document. (See Evid. Code, § 1520 et seq. and former Evid. Code, §§ 1500-1511, repealed by Stats. 1998, ch. 100, § 1, operative Jan.

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[5] See California Law Revision Commission Comment, West's Annotated Evidence Code sections 1500 to 1511 (2000 pocket supp.) page 35: "The Best Evidence Rule is repealed and replaced with the Secondary Evidence rule."

1, 1999.) For the most part, the District was not trying to prove the contents of Fitzgerald's notes with parol evidence. Rather, the District was trying to prove Johnson's statements and actions with respect to the notes as well as the fact that he executed the verification. The notes, after all, were purportedly notes of what Johnson said. Johnson, of course, can testify as to what he originally said to Fitzgerald, and to what he told Fitzgerald in terms of the inaccuracy of the notes.

Second, to the extent the District did try to prove the contents of the notes,[6] the failure to order them produced was not prejudicial. Zamvil contends that inspection of the notes would have helped answer these questions: (1) Did they contain initialing and dating by Johnson; (2) what do the notes indicate Johnson said Zamvil did in conjunction with drugs, if anything; (3) do the notes look more like questions than answers; and (4) do the notes impeach Fitzgerald's testimony about what Johnson told him?

To begin with, Johnson testified that he signed a statement saying the notes were accurate and initialed and dated each page of the notes. His testimony as to what he did is as good as the notes themselves. Next, Johnson testified that he verified the statement: "'[A]ctually saw him snorting cocaine and freebasing in front of students,'" but clarified that he told Fitzgerald "it looked like he had written down the question, not my response." From this the trial court found that Johnson verified that he told Fitzgerald "*that he* saw Mr. Zamvil snorting cocaine and freebasing cocaine with students in 1983." (Italics added.) While we agree that a perusal of the notes would have clarified their structure, i.e., whether some

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[6] For example, counsel for the District did ask for confirmation of the contents of the notes when he asked Johnson: "And one of the statements in those notes that you verified is, 'actually saw him snorting cocaine and freebasing in front of students,' correct?"

parts looked more like questions than answers, not having the notes was not prejudicial.

Ultimately, Fitzgerald's notes could only be relevant to the issue of whether the District acted in bad faith relying on *Fitzgerald's findings to* relay drug allegations to Zamvil's attorneys in order to intimidate him into resigning. Whether the notes were accurate or not, what is important is that Fitzgerald informed the District that he had identified a former student who had alleged Zamvil used drugs in his presence. The District corroborated the drug use allegations with three declarations from Zamvil's dissolution indicating his drug usage. Regardless of Fitzgerald's competency or integrity in interviewing Johnson and preserving his observations, there was no evidence indicating that the District would have reason to doubt Fitzgerald's integrity or accuracy as an investigator.

We affirm the judgment.

_____

Reardon, J.

We concur:

_____

Hanlon, P.J.

_____

Poché, J.

A081951

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Four
No. A081951, SO86292

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA
EN BANC

KENNETH B. ZAMVIL,
Appellant,

v.

PETALUMA JOINT UNION HIGH
SCHOOL DISTRICT, et al.
Respondents.

FILED: SUPREME COURT
APRIL 19, 2000
Frederick K. Ohlrich, Clerk
/ss/ FKO
Clerk

Appellant's petition for review is DENIED.

/ss/ GEORGE
Chief Justice

(2)

No. 00-116

FILED

AUG 21 2000

CLERK

In The

Supreme Court of the United States

KENNETH B. ZAMVIL,

Petitioner,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES CADMAN, SUPERINTENDENT,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS PETALUMA JOINT UNION HIGH SCHOOL DISTRICT'S AND CHARLES CADMAN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Supreme Court jurisdiction exists to review a state law contract rescission action where no federal or constitutional issues were raised in the proceedings below.

Whether there may exist a viable claim of duress for purposes of rescission where a resignation agreement was negotiated by three education labor law specialists, each of whom represented Petitioner during the week preceding his executing the resignation.

Whether grounds for rescission exist where an attorney executed the resignation agreement as Petitioner's agent and attorney, and where the attorney does not claim that he was misled or did not understand the terms of the agreement.

Whether grounds for rescission exist where Petitioner executed the resignation agreement two days after receiving it from his attorney and where Petitioner does not claim that he was misled or inadequately represented by his attorney.

Whether the trial court properly excluded evidence of the underlying investigation, school board decision-making process, and statement of charges as irrelevant and immaterial, given that Petitioner could have challenged the accusations of governmental misconduct, all of which were remote in time (18 months to three years) to execution of the resignation agreement by Petitioner and his attorney, a state law right which he waived by resigning his position rather than proceeding with the scheduled administrative hearing.

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OPINIONS BELOW

The decision of the California Court of Appeal, First Appellate District, dated January 18, 2000, affirmed the state trial court's verdict that Petitioner had failed to prove a legal basis for rescission of his resignation agreement. *See* App. A-1. On February 16, 2000 the state Court of Appeal denied a request for rehearing. *See* App. B-1. On April 19, 2000 the California Supreme Court denied a petition for review. *See* App. C-1.

JURISDICTION

Respondents argue below that the Petition for Writ of *Certiorari* fails to present matters within the jurisdiction of this Court. Petitioner's Complaint was filed in California Superior Court and was comprised *solely* of state law claims for rescission of his resignation agreement and declaratory and injunctive relief. There were no federal statutory or constitutional issues presented to the trial court or state Court of Appeal other than unpled purported due process violations which were *only* raised in Petitioner's briefing to the Court of Appeal. Yet by resigning his position rather than proceeding with the administrative hearing, Petitioner waived his statutory right to challenge his dismissal.

STATUTES AND OTHER PROVISIONS INVOLVED

California Civil Code § 1689 provides, *inter alia*, that:

> (b) A party to a contract may rescind the contract in the following cases:
>
> (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

INTRODUCTION

Respondents PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES-CADMAN, Superintendent (hereinafter collectively "DISTRICT") submit this brief opposing the Petition for Writ of *Certiorari* of an unpublished California appellate decision which affirmed the trial court's denial of rescission of a resignation agreement. Petitioner ZAMVIL, a former public high school teacher, irrevocably resigned his position on November 5, 1993 rather than proceed to a dismissal hearing scheduled before a three-person administrative law panel on November 8, 1993. JA:297-298.[1] The dismissal was based upon sixty-one (61) charges of misconduct, including

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[1] References to the Reporter's Transcript will be denoted as "RT:___" with citation to the relevant page(s); references to the joint appendix will be designated as "JA:___" followed by the pertinent page(s). The actual record will be submitted if the Petition is granted.

charges of sexual harassment directed at students, inappropriate touching of students, inappropriate statements to students and to parents, improper use of class time, leaving class unattended, and for failure to maintain integrity in his grading system. JA:286-294.[2]

Initially DISTRICT posits that the instant Petition is fatally defective for lack of jurisdiction as it fails to present questions of federal statutory or constitutional law. Once the self righteous polemics are set aside and the substance of the Petition is analyzed, there simply is no compelling reason to grant *certiorari* of a state law case for rescission where no federal statutory or constitutional issues were ever pled or raised in the proceedings below. ZAMVIL fails to identify any California statute repugnant to the Constitution or law of the United States. ZAMVIL fails to identify any conflict with any prior decision of this Court or any unsettled areas of the law. The facts presented are unique to ZAMVIL and fail to implicate any principles of general application.

ZAMVIL asserts that "[h]ad the District followed the law, there would not be a resignation and release." App. A-6. Yet he should have challenged the DISTRICT's charges and procedures in the administrative hearing and, if unsuccessful, judicial review of the administrative decision was available. *See* California Education Code §§ 44932, 44934, 44943-44945. App. D.

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[2] The trial court excluded evidence regarding the details underlying the charges on the grounds that the merits of the misconduct charges were irrelevant to a rescission action.

ZAMVIL ignores this Court's jurisdictional requirements as set forth in its rules. Assuming *arguendo* that jurisdiction is deemed proper, the state law causes of action and judgment fail to present substantive issues deserving review by this Court. Having failed to convince a state court discovery referee, the trial court, the California Court of Appeal, and the California Supreme Court of the soundness of his arguments, ZAMVIL attempts to ignite this Court's interest by portraying his asserted issues as raising waiver concerns of constitutional magnitude. His arguments are unavailing.

The crux of this matter is that ZAMVIL was provided his constitutional due process and rights under the California Education Code to challenge his dismissal; he consulted with various legal counsel and ultimately directed his attorney, as his attorney and agent, to execute a resignation agreement rather than to go forward with the administrative hearing scheduled for three days later. ZAMVIL himself executed the resignation agreement the next day, *in his attorney's office*. Yet ZAMVIL cites to federal due process violations without identifying any procedural defects in the administrative hearing process or any purported facts which he could not have discovered without due diligence prior to his resignation. The state Court of Appeal soundly rejected ZAMVIL's arguments and concluded that, while represented by competent legal counsel, he had waived his rights under the California Education Code when he chose to resign his position.

STATEMENT OF THE CASE

Despite ZAMVIL's polemics, in essence this case is simply a state law rescission action where ZAMVIL:

(1) engaged, through his attorney (Bertoli), in 18 months of administrative discovery and hearing preparation in an effort to challenge his dismissal before an administrative law panel, as was his statutory right under the California Education Code;

(2) retained three attorneys (Bertoli, Gallenson, Winslow) who specialized in education labor law and who, as the record establishes with unmistakable clarity, each negotiated his resignation terms during the week prior to the calendared administrative dismissal hearing (Bertoli, RT:208:28-209:28; 216:28-217:11; 314:21-315:4; Winslow, RT: 72:10-73:2; 96:5-21; 490:15-28; 493:21-496:16; and Gallenson, RT:289:5-10; 499:6-9);

(3) authorized one of his attorneys (Gallenson), as his attorney and agent, as ZAMVIL was working that day outside of Sonoma County, to execute the resignation agreement three days prior to the dismissal hearing (RT:390:21-26; 391:12-392:1; 392:15-19; 393:4-8); and

(4) executed the resignation agreement on the following day, in his attorney's office (RT:238:6-13).

ZAMVIL was fully advised as to the nature and content of the agreement by his attorneys; he does not claim that he was not adequately advised.[3] (RT:279:14-280:5; 393:4-8; JA:547-550)

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[3] ZAMVIL testified that it was his expectation that attorney " . . . Gallenson would handle [signing of the resignation]."

Relying on well-settled California law (*see Odorizzi v. Bloomfield School District*, 246 Cal.App.2d 123, 54 Cal.Rptr. 533) (1966), the California Court of Appeal correctly rejected ZAMVIL's attempt to litigate issues which may have been properly raised in the administrative forum, but were not relevant to the contract rescission action. The Court explained in its unpublished opinion that

> Zamvil has outlined a list of 17 purported instances of "egregious conduct" by the District- . . . . These run the gamut from drumming up complaints, falsifying records, concealing information and committing perjury to breaching the collective bargaining agreement to violating the Education Code, the Brown Act and board policies and bylaws.
>
> ¶ Zamvil contends the trial court erred in ruling that evidence relating to this alleged misconduct was irrelevant to his rescission action . . . . ¶ With these and similar statements, Zamvil consistently has tried to connect the events and processes leading up to the filing of charges – including the District's basis and preparation of the misconduct charges – with the execution of the resignation agreement itself. The problem

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RT:354:2-4. Gallenson testified that he had authority from ZAMVIL to execute the resignation agreement and that Gallenson understood the terms of the agreement. RT:283:22-25; 284:5-12. He considered ZAMVIL to have been his client when he executed the resignation agreement. RT:269:8-11; 288:14-19. Although Gallenson asserted attorney-client privilege with respect to any conversation he had with ZAMVIL regarding the resignation agreement (RT:288:3-7), he nevertheless testified that he had spoken with ZAMVIL "a number of times" during the week before he and ZAMVIL each signed the resignation agreement. RT:279:14-280:5.

> with this analysis is that duress, undue influence and fraud all go to whether or not Zamvil freely consented *to the agreement*.
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> App. A-5-6 [Italics in original].

Although ZAMVIL portrays his action as one reaching beyond its precise contours into matters implicating widespread public policy concerns, in fact here there are no important public policy questions to overcome the jurisdictional flaws outlined below.[4] The trial court, and the Court of Appeal, both found *Odorizzi* to be the well-settled law in California regarding rescission actions and persuasive when applied to the facts of this case.

ZAMVIL's counsel told the trial court, " . . . this is an action for rescission, the purpose of which is to allow the Plaintiff to establish his good name and reputation with respect to his teaching career." RT:62:26-63:2; 331:25-27. ZAMVIL is mistaken. The trial court replied that in an action for rescission of a contract, evidence relevant to the investigation and applicable rules and proceedings was irrelevant. RT:331:28-332:1. A rescission action does not clear one's name; it rescinds a contract. Here the contract is the resignation agreement.

Prior to his intended dismissal, DISTRICT employed ZAMVIL as a high school teacher in August 1973.

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[4] To the extent that ZAMVIL cites to the administrative record, his citations do not support the sweeping legal conclusions asserted in his Petition. Moreover, the citations are frequently to lower court briefing rather than to admissible evidence. Indeed, ZAMVIL's offers of proof throughout the trial were devoid of admissible evidence and the trial court found them unavailing. The Court of Appeal agreed. App. A-6.

RT:331:8-9. He continued in that position until March 2, 1992, at which time he was suspended by DISTRICT's school board pending final disposition of 41 charges of misconduct filed by the school board on April 10, 1992. JA:286-294; RT:331:10-11. The charges included, *inter alia*, charges of sexual harassment and inappropriate touching of students. The charges were amended on February 23, 1993 after additional witnesses were interviewed; their accusations were included to reach 61 allegations of misconduct.

An administrative hearing was set for November 8, 1993. RT:341:6-7. The statement of 61 misconduct charges was prepared *solely* on the basis of the transcripts of parent and student interviews conducted by Jack Fitzgerald, the investigator retained by DISTRICT's legal counsel. RT:260:6-16; 436:8-11; 437:15-438:4; 515:10-13.

Throughout the eighteen- (18-) month administrative discovery and pre-hearing stage ZAMVIL was represented by a battery of attorneys, several of whom were teacher labor law specialists: Attorneys Weintraub (JA:71); Scher (JA:93); Fehl (JA:92); Bertoli (RT:208:28-209:28; 216:28-217:11; 314:21-315:4); Winslow (RT: 72:10-73:2; 96:5-21; 490:15-28; 493:21-496:16); and Gallenson (RT:289:5-10; 499:6-9) In addition to the extensive experience of Bertoli and Gallenson in representing teachers, the California Teachers Association employed Weintraub (JA:76) and Winslow (RT:96:5-8) to represent ZAMVIL in this matter. Only for a period of approximately one week (October 25 to November 4, 1993) was it unclear to DISTRICT whether ZAMVIL was represented by an attorney. RT:211:6-9.

A motion for continuance of the November 8th dismissal hearing was denied by an administrative law judge at hearing on November 3, 1993. RT:73:3-5; 74:20; 269:23-25. On ZAMVIL's behalf attorney Bertoli prepared a superior court motion to continue the dismissal hearing based on the grounds that he was without counsel and thus required additional time to prepare his case. RT:263:17-264:4. That motion was filed by ZAMVIL *in propria persona*, although attorney Gallenson appeared on his behalf and argued the motion. RT:222:15-223:16. On November 5th the court denied the request.

During the week preceding the November 8, 1993 administrative hearing on ZAMVIL's dismissal, settlement negotiations were engaged in by attorneys Bertoli, Winslow and Gallenson on behalf of ZAMVIL, and DISTRICT's counsel Margaret Merchat and Robert Henry. Bertoli and Gallenson negotiated terms and revisions to the draft resignation agreement, such as its effective date and a "neutral" employment reference.[5] JA:547; RT:231:1-232:1; 391:2-392:1. The resignation agreement also provided that DISTRICT would advise the Commission on Teacher Credentialing of the statement of charges. JA:544-546; RT:418:2-23. ZAMVIL testified falsely under oath that on November 4, 1993 he did not know about the requirement of notification to the Commission. The trial court found that ZAMVIL was untruthful. JA:545.

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[5] A neutral recommendation is one which states the period of time during which the employee worked for the DISTRICT, salary and position. RT: 97:6-13. *And see* paragraph 6 of resignation agreement. JA:297-298.

Before canceling the Monday dismissal hearing, DISTRICT required that the resignation agreement be fully executed no later than the close of business on Friday, November 5, 1993. RT:287:19-288:2. The purpose of the deadline was to clarify whether DISTRICT's 30 witnesses could be released and to determine the need for weekend hearing preparation by DISTRICT's counsel. ZAMVIL was working outside of Sonoma County on November 5, 1993; ZAMVIL authorized his attorney, Gallenson, to execute the agreement on his behalf. RT:284:5-8; 390:21-392:1. Gallenson executed the agreement and forwarded it to DISTRICT's counsel, at which time DISTRICT canceled the hearing. RT:233:24-236:4; 502:17-503:4; JA:297, ¶4. ZAMVIL executed the resignation agreement at Gallenson's office the next morning. RT:238:6-13.

On June 28, 1994 (JA:1) ZAMVIL filed a superior court rescission action. The trial court granted Defendants' motions *in limine* to exclude as irrelevant evidence that the misconduct charges were grounded in allegedly unlawful school board meetings and improper investigation. RT:3:17-5:3; 17:4-25:10; JA:330-338; 358-360; 373-375; 792-800. The trial court conducted a five-day bench trial.

The strength of DISTRICT's case is manifested by ZAMVIL's decision to resign rather than to contest the evidence against him. By the November 5th execution of the resignation agreement, ZAMVIL had extensively prepared for the dismissal hearing, intending to call some 70-80 witnesses. RT:259:25-28. ZAMVIL conducted sufficient discovery during the 18-month pre-hearing time

frame to identify these witnesses and to confront DISTRICT's case, if he wished to do so.[6]

The Discovery Referee and trial court rejected ZAMVIL's attempt to turn the rescission trial into the administrative hearing to which he had previously waived his right. The Report of the Discovery Referee was confirmed by court order dated June 10, 1996.[7] JA:427, 434-439. The trial court adopted the Discovery Referee's rationale. RT:20:4-19. Thus, in discovery there was an uncontested finding that the evidence ZAMVIL now claims requires reversal was not even discoverable, *i.e.*, not calculated to lead to the discovery of admissible evidence. In his appellate briefing ZAMVIL again unsuccessfully attempted to inject the Court into the role of the administrative law judge by seeking to introduce at the appellate level evidence of purportedly unfounded charges of misconduct and dismissal procedures.

For purposes of an administrative dismissal hearing, California Education Code § 44944 provides a statutory right to engage in broad administrative discovery to challenge an investigation and other perceived due process

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[6] The trial court excluded as irrelevant to the rescission action any evidence of the underlying investigation as well as school board policies and decision-making. The trial court's decision on this evidence was consistent with that of the Discovery Referee, who had concluded that discovery into these subjects (which had occurred 18 months to three years *prior* to ZAMVIL's resignation) was not even calculated to lead to the discovery of admissible evidence. JA:192-194; 325-329.

[7] ZAMVIL never challenged the Discovery Referee's decision by writ or any other action.

violations. It was during this 18-month pre-hearing process that ZAMVIL had both the *statutory mechanisms* and the *motivation* to identify facts supporting his government conspiracy theories.[8]

Contrary to ZAMVIL's assertion that "the District's violations were from the outset designed to 'steamroll' him," (Petition p. 5) "[t]he record demonstrates that Zamvil had the assistance of competent, informed counsel during the settlement process." (App. A-10)

ZAMVIL's allegations of governmental misconduct should have been asserted in the administrative forum. The unanimous Court of Appeal panel concluded that:

> [m]ore than 18 months had elapsed from the initial filing against Zamvil and the settlement. The District's conduct occurring up to initiation of the administrative proceeding was highly pertinent to the outcome of *that* proceeding. . . . His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections.
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> App. A-6-7 [Italics in original].

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[8] At p. 3, n.3 of the Petition ZAMVIL acknowledges what the record below demonstrates: that sufficient discovery had been conducted by ZAMVIL's attorney to identify 70-80 witnesses for trial subpoenas.

LEGAL ARGUMENT FOR DENYING THE WRIT

A. THE STATE COURT JUDGMENT BELOW IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS. THEREFORE ARGUABLY THIS COURT LACKS JURISDICTION OVER THIS MATTER.

In DISTRICT's view the instant Petition to review a judgment denying ZAMVIL's state court Complaint for rescission of his resignation should be summarily denied for lack of jurisdiction. Pursuant to Supreme Court Rule 14.1(e), a petition for writ of *certiorari* shall contain, *inter alia*, a statement of the basis for jurisdiction in this Court, showing the statutory provision believed to confer jurisdiction.

ZAMVIL ignores the function of the Supreme Court in the American system of government. This Court serves as the ultimate authority as to the meaning of the United States Constitution. Secondly, it must ensure the supremacy of federal law. Thirdly, this Court has the authority to resolve conflicting interpretations of *federal law* among the various state and federal courts, thereby ensuring the uniformity of federal law. Finally, this Court possesses the ultimate power to interpret federal statutes.

It is beyond dispute that this Court may decide only questions of federal law. This Petition arises from a judgment which is silent on federal law; judgment rested solely upon state law contract principles. Therefore, ZAMVIL is simply mistaken when he seeks *certiorari* of a state law action for rescission of a resignation agreement. Subject only to a narrow exception, not here relevant, this Court's authority to hear appeals from state courts is

based entirely on its role in upholding and interpreting federal law except where the state law issue is integrally tied to a federal question. *See e.g. Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that the Court may review only questions of federal law and that the decisions of the state's highest court are final on questions of state law).

To determine whether the state court judgment is in fact based on independent and adequate state grounds, and whether any federal question has actually been considered and resolved, DISTRICT suggests that this Court turn to the California Court of Appeal decision reproduced at Appendix A hereto. The opinion shows that no federal interest is implicated. ZAMVIL's statement of jurisdiction recognizes that no federal constitutional or statutory right was raised below. The statement, found at page 1 of the Petition, is reproduced in full below:

> This Court's jurisdiction is invoked under 28 U.S.C. Sections 1257 and 2101, this being a petition arising out of a right claimed under the Constitution of the United States. The petition is filed within 90 days of April 19, 2000.

The plain language of 28 U.S.C. § 1257 demonstrates that ZAMVIL's Petition is fatally defective for lack of jurisdiction:

> Final judgments . . . by the highest court of a State . . . may be reviewed by the Supreme Court . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws

> of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Moreover, Supreme Court Rule 14(g)(i) sets forth specific jurisdictional requirements which ZAMVIL has failed to satisfy:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari . . .*
>
> [Italics added.]

ZAMVIL does not explain the grounds allowing him to fail to plead a federal statutory or constitutional issue in the Complaint upon which the trial is based, and then to seek to invoke federal jurisdiction by arguing a due process violation in the appellate briefing. ZAMVIL's opening brief to the state Court of Appeal ZAMVIL attempted to *retroactively* plead a due process cause of action:

6. The District's violations of law were more than simply statutory. "Public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process." *Board of Regents of State College v. Roth*, 408 U.S. 564, 578 (1972); *see also Perry v. Sindermann*, 408 U.S. 593, 602-603 (1972). Public employees dismissible only for cause are also entitled to a limited hearing *prior* to termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Absent a sufficiently strong governmental interest, due process is violated by failing to provide notice and hearing before suspending a tenured public employee without pay. *Gilbert v. Homar*, 520 U.S. 924 (1997)."

Opening Brief to Court of Appeal at p. 7 [Italics in original.]

Far more than civil statutory violations are implied by these [17] allegations. Indeed, the allegations implicate multiple violations of the United States and California Constitutions, and Sec. 1983 of the Federal Civil Rights Laws, which prohibits state action which subjects a citizen to a deprivation of rights and privileges secured by the Constitution and laws. 42 U.S.C. Sec. 1983. Indeed, plaintiff's allegations entail violations of State and Federal criminal laws.

Opening Brief to Court of Appeal at p. 31.

However, ZAMVIL's Complaint was limited to the following three *state law* causes of action:

1. Rescission of Contract for Fraud, Duress and Undue Influence;

2. Injunctive Relief; and

3. Declaratory Relief. JA:011-014

Moreover, after receiving an adverse decision at trial, ZAMVIL failed to request any finding of fact or conclusion of law in the Statement of Decision as to a federal or constitutional ground. *See* JA:444 ("Whether Zamvil was allowed at trial to introduce any evidence concerning the voidability of the District's action against Zamvil due to procedural violations, not in compliance with California Government Code, California Education Code, the collective bargaining agreement, Petaluma School Board by-laws and policies.")

Therefore, ZAMVIL's fatal error is that this Court lacks jurisdiction to review a judgment based on independent and adequate state grounds. Indeed, the substantive legal issues of contract rescission in the proceedings below involved the law and statutes of the State of California, not federal law. *See e.g. Klinger v. Missouri*, 13 Wall. 257, 263 (1871) (if the Court concludes that the state law ground is both independent and adequate to support the judgment, "this court will not assume jurisdiction of the case.") This rule is therefore a corollary of the fundamental principle that the Court lacks jurisdiction to review matters of state law. That principle flows from the United States Constitution Article III limitation on federal judicial power, and also from the jurisdictional requirements imposed by 28 U.S.C. § 1257.

An adequate state ground requires that it be independent of any federal ground. ZAMVIL's failure to sufficiently identify federal rights raised below compels the

conclusion that proper and sufficient jurisdictional grounds have not been presented to this Court.

It is also well established that this Court defers to the Circuit Courts of Appeal regarding interpretation of state law and therefore will only rarely grant review to correct errors in interpreting state law. *See e.g. McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786 (1997). The same deference should apply to the state courts below.

It is well-settled that the purpose of Supreme Court review is (1) to determine important constitutional questions; (2) to interpret federal statutes; and (3) to maintain harmony among the decisions of the Circuit Courts of Appeal and with state court interpretations of federal questions. *See* Supreme Court Rule 10.

In the proceedings below the California Supreme Court denied ZAMVIL's Petition for Review. *See* Appendix C-1 hereto. The Petition for Writ of *Certiorari* does not demonstrate that the California courts wrongly decided, *or even considered*, any important question implicating federal law or the Constitution. There is no issue of a state court of last resort having decided a federal question in conflict with another state court of last resort or with a federal court. In the final analysis, the state court decision below fails "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974); *and see Arizona v. Manypenny*, 451 U.S. 232, 239 (1981).

In sum, ZAMVIL made no adequate offer of proof in writing or otherwise during the trial and he continues to fail to show any link between the alleged governmental misconduct and grounds for rescission.[9] As the Court of Appeal opined, "[t]he trial court's evidentiary decisions were sound." App. A-8. Having failed to exercise his statutory rights to discover relevant facts as to "fraudulent concealment," or to explain why he could not have obtained the facts through diligent discovery, ZAMVIL waived his objections. Having waived his administrative remedies, he is now bound by the execution and terms of his resignation agreement. There are no grounds which implicate Supreme Court review. *Certiorari* should be denied.

B. ASSUMING *ARGUENDO* THAT JURISDICTION IS DEEMED PROPER, ZAMVIL FAILS TO PRESENT SUBSTANTIVE ARGUMENTS DESERVING REVIEW OF THIS STATE LAW CONTRACT RESCISSION ACTION.

1. The State Court of Appeal Properly Concluded That by Resigning ZAMVIL Had Waived His Rights.

As held by the state Court of Appeal, any constitutional due process issue was waived when ZAMVIL

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[9] ZAMVIL does not assert that he made any demand to "cure" any procedural defects in the purportedly unlawful school board meetings, as provided for under applicable statutory authority. Violations of the Brown Act are voidable, not void as a matter of law. *See* Government Code § 54960.1. App. D.

decided to resign his teaching position rather than avail himself of the administrative challenge to which he had a right under the California Education Code:

> . . . Zamvil had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. . . . His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections. Appendix A-7.

The Court of Appeal observed that:

> [i]n order to cancel the administrative hearing set for Monday, November 8, the District required that the resignation agreement be executed by the close of business on Friday, November 5. The District was looking at calling approximately 30 witnesses in the event the hearing went forward. Zamvil, however, was out of town on a teaching assignment, so Attorney Gallenson signed the resignation agreement for him on Friday; Zamvil executed it in person on Saturday. The District in turn canceled the proceeding. . . . *Seven months later Zamvil filed his action for rescission of the resignation agreement on account of duress, undue influence and fraud.*
>
> Appendix A-3 [Emphasis added.]

The following admissions by ZAMVIL established the absence of grounds for rescission while upholding the legal viability of the resignation agreement:

1. ZAMVIL's verified Complaint omits any allegation that, after signing his resignation agreement, he learned of any new information which would support his

rescission grounds of fraudulent concealment of facts or undue influence.

2. ZAMVIL never asked attorney Gallenson to communicate to DISTRICT's legal counsel that he was too emotionally distraught or "tired" to enter into a resignation agreement. RT:393:13-17; 399:14-20.

3. ZAMVIL does not claim that attorney Gallenson pressured him into signing the resignation agreement. RT:394:7-10.

4. ZAMVIL was given a draft of the resignation agreement *two days* prior to him signing the agreement in Gallenson's office. RT:394:11-28.

The trial court properly concluded that the elements of rescission had not been proven:[10]

> *FINDING:* Mr. Gallenson, plaintiff's counsel, understood the terms of the resignation agreement. He signed the agreement as agent and attorney for Mr. Zamvil and with his authority on November 5, 1993. Mr. Bertoli and Mr. Gallenson advised Mr. Zamvil regarding the terms of the contract. The contract is valid. No grounds for rescission have been proved.

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[10] California Civil Code § 1689 provides, *inter alia*, that:

(b) A party to a contract may rescind the contract in the following cases:

> (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

. . .

FINDING: The resignation agreement was not signed under duress caused by the defendants. Based on the evidence, plaintiff has not proven any unlawful action or threat on the part of defendants which caused plaintiff to sign the resignation agreement rather than go forward with the administrative hearing.

. . .

FINDING: 1. Plaintiff was advised by three attorneys, who are CTA [California Teachers Association] specialists.

2. Counsel for District was negotiating with plaintiff's attorneys during regular business hours.

3. The transaction was consummated in Mr. Gallenson's office on both November 5 and November 6, 1993.

4. The only consequences of delay of reaching an agreement would have been that Mr. Zamvil proceed with the administrative hearing as he had a right to do.

5. Mr. Zamvil's attorney, Mr. Gallenson, did not believe the evidence would be admitted at the administrative hearing regarding Mr. Zamvil's past drug use with students.

6. No multiple persuaders attempted to dominate an unrepresented individual. All communications regarding settlement were made through plaintiff's attorneys.

. . .

> *FINDING:* The record is devoid of evidence of fraudulent statements or acts by defendants intended to secure the signature of defendant to the resignation agreement.
>
> . . .
>
> *FINDING:* Plaintiff failed to plead mistake in his Complaint in this action. Further, the record establishes that the material facts of the transaction were known to both parties. Neither party was under any misapprehension of law of which the other took advantage. There was no mistake by the plaintiff in his understanding of the nature and consequences of signing the resignation agreement.
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> JA:572-573.

Ultimately, it was ZAMVIL's burden to show that (1) he subsequently obtained knowledge regarding unlawful conduct by DISTRICT which he did not possess when executing the resignation agreement, and (2) that this knowledge was fraudulently or otherwise impermissibly withheld or concealed by DISTRICT. He failed to make such a showing.[11] For example, at Petition pp. 10-11 he asserts that it was not until Superintendent CADMAN's deposition that it was revealed that the August 14, 1990

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[11] ZAMVIL alleges at Petition pp. 4-5 that a tape recording was made of the 1990 school board meeting. However, there was no offer of proof that the tape even existed, and the Discovery Referee concluded that ZAMVIL had not articulated a theory of the school board meetings' relevance to the rescission action. Likewise, there was no offer of proof based on information from persons interviewed by investigator Fitzgerald that DISTRICT attempted to fabricate evidence, nor did ZAMVIL even identify those witnesses.

hearing was an open public meeting. However, (1) given the Brown Open Meeting Act (California Government Code §§ 54950, *et seq.*) notice requirements and the Public Records Act (California Government Code §§ 6250, *et seq.*) ZAMVIL had constructive knowledge of or with due diligence could have learned years before his resignation of the open or closed status of that school board meeting (*see* App. D); (2) he could have challenged its lawfulness in the administrative hearing; and (3) CADMAN's deposition was not made part of the appellate record. The Discovery Referee reached the same conclusion as had the trial court regarding this irrelevant evidence:

> . . . [P]laintiff has not articulated a theory of how the events at the closed school board meetings will lead to the discovery of admissible evidence. There has been no indication, by way of theory, offer of proof or otherwise, that the events that occurred at the school board meetings will guide the plaintiff to evidence of fraud, duress or undue influence.
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> JA:194.[12]

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[12] DISTRICT further notes that ZAMVIL misstates the record when he asserts that "the immoral conduct charges arose out of the allegedly secret August 14, 1990 Board of Education hearing. Petition, p. 5. Rather, the record speaks with clarity to the point that the charges were based *solely* on investigator Fitzgerald's witness interviews, which *were* provided to ZAMVIL. RT:260:6-16; 436:8-11; 437:15-438:4; 515:10-13. ZAMVIL does not claim that those transcripts were withheld. Moreover, ZAMVIL fails to cite to the record in support of his allegation that a transcript of any August 14, 1990 Board of Trustees' meeting indeed ever existed.

2. ZAMVIL Was Represented by Legal Counsel for the Purpose of Executing His Resignation.

As a rationale for not proceeding with the administrative hearing, ZAMVIL places strong reliance on his purported *in pro per* status. Petition, p. 3. However, the record below demonstrates that ZAMVIL was represented by *six* attorneys throughout the pre-administrative hearing stage and *three* attorneys negotiated the resignation agreement on his behalf. RT:489:1-5.[13]

ZAMVIL does *not* claim that he has discovered any new evidence subsequent to signing his resignation agreement which he could not have learned earlier with due diligence during his attorneys' 18 months of administrative discovery.

3. ZAMVIL's Attorney and Agent for Executing the Resignation Has Not Claimed Any Misconduct by DISTRICT Warranting Rescission.

Gallenson never asserted that DISTRICT was overreaching in any manner or that the resignation agreement did not accurately represent the negotiated terms. There is no evidence in the record that Gallenson or ZAMVIL

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[13] During settlement negotiations during the week prior to the November 8, 1993 dismissal hearing, ZAMVIL's counsel requested that the resignation agreement reflect an effective resignation date of June 30, 1994, to make it appear that his resignation occurred after the end of the school year. DISTRICT agreed to this modification. JA:297, ¶1. *And see* Trial Exhibits D and E.

did not understand the resignation terms.[14] Moreover, no new evidence as to DISTRICT's actions is alleged to have been discovered by ZAMVIL subsequent to his execution of the resignation agreement that had either been concealed by DISTRICT or that could not have been discovered with due diligence. Therefore, as the Court of Appeal concluded, there was simply no basis for rescission of the resignation.

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[14] At Petition pp. 11-12 ZAMVIL enumerates 17 offers of proof which he was allegedly denied the opportunity to prove at trial. This purported misconduct by DISTRICT includes alleged violations of statutes, DISTRICT policies and bylaws, and unethical behavior. ZAMVIL could have raised these issues at his administrative hearing. However, instead ZAMVIL chose to resign and he should not be allowed to circumvent his administrative remedy.

CONCLUSION

Upon the reasons set forth above, Respondents PETALUMA JOINT UNION HIGH SCHOOL DISTRICT and CHARLES CADMAN, SUPERINTENDENT, respectfully urge that the Petition for Writ of *Certiorari* be denied.

Dated: August 21, 2000

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APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

KENNETH B. ZAMVIL,

Plaintiff and Appellant,

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT et al.,

Defendants and Respondents.
_____/

A081951

(Sonoma County Super. Ct. No. 208215)

Appellant Kenneth B. Zamvil appeals from the judgment in favor of respondents Petaluma Joint Union High School District (District) and its superintendent, Charles Cadman, on his action for rescission of contract and other relief. We affirm the judgment.

I. BACKGROUND

After 19 years of service as a science teacher at Casa Grande High School in respondent District, on March 2, 1992, the board of education suspended Zamvil pending final disposition of numerous charges of misconduct. The charges included allegations of multiple occasions of (1) saying or doing things that were offensive to female students; (2) taking class time to discuss matters involving his personal life; (3) making inappropriate statements

to students that raised questions about the integrity of his grading system; (4) starting class late; and (5) touching or hitting students in inappropriate ways. The board issued amended charges – for a total of 61 allegations of misconduct – on February 23, 1993. James Bertoli represented Zamvil from approximately mid-March 1992 until October 25, 1993.[1] Thereafter the California Teachers Association (CTA) appointed Priscilla Winslow to represent him for the limited purpose of arguing for a continuance of the administrative hearing set for November 8. The motion to continue was heard on Wednesday, November 3. The administrative law judge denied a continuance.

After the hearing, Robert Henry, chief counsel for the District, disclosed to Winslow that the District had a potential new charge. Several days earlier, Jack Fitzgerald, the investigator retained by the District, reported that one of Zamvil's former students alleged that Zamvil had used drugs in his presence. A day or two later Henry had a further conversation with Winslow and faxed her corroboration in the form of declarations in a civil action that indicated Zamvil's drug usage. Apparently the student's information was 10 years old, but Henry was of the opinion that there was precedent to circumvent the 4-year statute of limitations for disciplinary actions against certificated teachers.

Settlement negotiations ensued. Zamvil had the assistance of Bertoli as well as Steve Gallenson during this process. Gallenson testified that he began acting as

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[1] All further dates are in the 1993 calendar year unless otherwise specified.

temporary counsel to Zamvil around October 28, in order to facilitate the settlement process. During this time frame Bertoli was also meeting with Zamvil and discussed settlement with Margaret Merchat, another attorney in the District's legal department. Merchat prepared the initial draft. Revisions were proposed, and made, to accommodate Zamvil with respect to the effective date of his resignation and the type of reference the District would give to prospective employers.

In order to cancel the administrative hearing set for Monday, November 8, the District required that the resignation agreement be executed by the close of business on Friday, November 5. The District was looking at calling approximately 30 witnesses in the event the hearing went forward. Zamvil, however, was out of town on a teaching assignment, so Attorney Gallenson signed the resignation agreement for him on Friday; Zamvil executed it in person on Saturday. The District in turn cancelled the proceeding.

Seven months later Zamvil filed his action for rescission of the resignation agreement on account of duress, undue influence and fraud. The trial court granted the District's motions to exclude evidence that the school board meetings leading up to the misconduct charges, as well as the ensuing investigation, were improper. Following a six-day bench trial, the court entered judgment denying Zamvil any relief. Likewise, the court denied Zamvil's motion for new trial. This appeal followed.

II. DISCUSSION

A. Law of Rescission

Civil Code[2] section 1689 sets forth grounds for unilateral rescission. These include cases where "the consent of the party rescinding . . . was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds. . . . " (*Id.* at subd. (b)(1).) And even where a transaction is free from fraud, duress or undue influence, a contract can be rescinded "[i]f the public interest will be prejudiced by permitting" it to stand. (*Id.* at subd. (b)(6); *Grimes v. Allen* (1949) 93 Cal.App.2d 653, 656.)

Duress consists of unlawful or fraudulently obtained confinement of a person, his or her relatives or property which causes the person to consent to a transaction out of fear. (See § 1569; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128.) The related doctrine of economic duress has been recognized as a basis for rescinding a settlement agreement. However, in light of the notions of protecting the freedom of contract and according finality to private dispute resolutions, courts are reluctant to set aside settlements. Thus, they apply the economic duress doctrine in limited circumstances, as a " 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058.) The doctrine comes "into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person

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[2] All further statutory references are to the Civil Code unless otherwise specified.

faced with no reasonable alternative to succumb to the perpetrator's pressure." (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158.) Economic duress as a ground for rescinding a contract is thus a tool to correct "the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value." (*Id.* at p. 1159.)

By definition undue influence includes "taking an unfair advantage of another's weakness of mind" (1575, subd. 2) or "taking a grossly oppressive and unfair advantage of another's necessities or distress" (*id.* at subd. 3). Factors to be considered in determining whether there was "undue influence" include " 'the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded.' " (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 423, p. 380, quoting Rest.2d Contracts, § 177, com. b.)

Actual fraud involves conscious misrepresentation, concealment or false promises which induces another to enter a contract. (1572; *Odorizzi v. Bloomfield School Dist., supra,* 246 Cal.App.2d at p. 128.) Constructive fraud " 'comprises all acts, omissions and concealments involving breach of legal or equitable duty, trust, or confidence, and resulting in damages to another.' " (*Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1368-1369.)

B. Scope of Relevant Evidence

Zamvil has outlined a list of 17 purported instances of "egregious conduct" by the District in hearing initial allegations of misconduct from parents, conducting related actions leading up to his discharge and initiating

and carrying out the underlying investigation. These run the gamut from drumming up complaints, falsifying records, concealing information and committing perjury to breaching the collective bargaining agreement to violating the Education Code, the Brown Act, and board policies and bylaws.

Zamvil contends the trial court erred in ruling that evidence relating to this alleged misconduct was irrelevant to his rescission action. He argues, for example, that the November 1993 resignation agreement "was inextricably tied" to the District's behavior which he variously describes as amounting to economic duress, undue influence, constructive fraud and a violation of public policy. "**Had the District followed the law,**" he argues in his opening brief, "**there would not be a resignation and release.**" (Original bold-faced type.) The ruling was proper.

With these and similar statements, Zamvil consistently has tried to connect the events and processes leading up to the filing of charges – including the District's basis and preparation of the misconduct charges – with the execution of the resignation agreement itself. The problem with this analysis is that duress, undue influence and fraud all go to whether or not Zamvil freely consented *to the agreement*.

To begin with, the investigation process and what it revealed as well as the District, practices, actions and procedures in hearing the initial complaints and developing the statement of charges were too remote in time to impact Zamvil's consent to the resignation agreement. More than 18 months had elapsed from the initial filing

against Zamvil and the settlement. The District's conduct occurring up to initiation of the administrative proceeding was highly pertinent to the outcome of *that* proceeding. Zamvil had plenty of time to investigate and take action within the administrative proceeding with respect to all the purported violations. Copies of interview transcripts from the interviews with parents and students that Fitzgerald elected to tape-record were given to Zamvil. His remedy was to challenge the District's procedures, actions and processes in the administrative proceeding. Having declined to do so, he has waived these objections. This includes the objection based on violation of public policy because again, that objection goes to events predating the settlement negotiations.

Similarly, the trial court properly excluded as irrelevant the testimony of James McGloin, retired principal of Casa Grande High School. McGloin retired in 1993 and was not involved with events surrounding the resignation agreement. McGloin, as site administrator, had evaluated Zamvil's teaching performance. And although his testimony might have been relevant at the administrative hearing on the validity of the charges against Zamvil, the trial court had it right in ruling that McGloin had nothing relevant to offer on "whether or not there was some [overreaching] or concealment at the time of the entry into the contract."

C. *Necessities and Distress*

Zamvil also complains that the trial court wrongfully prevented him from putting on proof of his necessity or

distress, a necessary element of a claim of undue influence pursuant to section 1575. According to Zamvil, the trial court erroneously excluded relevant evidence concerning "his *in pro per* status, his lack of informed and prepared counsel during settlement negotiations and, on the eve of a lengthy and complex administrative trial, his inability to find alleged drug witness Johnson, and his own distressed mental state." (Original italics.) The trial court's evidentiary decisions were sound.

1. Representation During Settlement

First, as to the status of Zamvil's representation during the settlement process, we note that the trial court was well aware of the situation, pointing out the following pertinent facts in its summary of facts: "Throughout the administrative proceeding, Plaintiff was represented by six attorneys, most specialists in teacher labor matters. (There was a period of about one week when the School District did not know whether Plaintiff was represented by counsel.) Plaintiff's principal attorney was Mr. Joseph Bertoli until October 25, 1993, when he withdrew from plaintiff's case. [¶] . . . (Plaintiff filed the motion [to continue] in *pro per*.)" (Original underscore.)

Second, although it appeared to the District that Zamvil was without representation during the period spanning October 25 – when Mr. Bertoli withdrew – and November 4, in fact both Bertoli and Gallenson consulted with Zamvil during the period leading up to the November 5 settlement agreement. Moreover, Gallenson testified that he commenced "temporary" representation of Zamvil on October 28 for purposes of facilitating execution of

the resignation agreement. Additionally, Winslow specially appeared to argue the motion to continue the administrative hearing. Finally, all of these lawyers were experienced in teacher labor relations matters.

Bertoli of course was amply informed about the case, having represented Zamvil since March 1992. Bertoli and Merchat, on behalf of the District, discussed settlement and touched on the "general terms of the settlement agreement." Merchat provided Bertoli with a draft of the settlement agreement on November 4; Bertoli met with Zamvil and his wife that evening about an ex parte matter. Merchat provided him with a draft of the settlement agreement and she made changes based on discussions with both Bertoli and Gallenson.

Gallenson first became aware of Zamvil's situation earlier in 1993 when Zamvil phoned him with several transcripts of student interviews. By November 5 he had examined the amended statement of charges, as well as some student interviews and a deposition. According to both Merchat and Henry, Gallenson seemed familiar with the case. Merchat had settlement discussions with Gallenson, confirmed in a faxed memorandum. Gallenson also had settlement conversations with chief counsel Henry, including a candid discussion about Henry's assessment of the strength of the case. As well, both Merchat and Henry discussed with Gallenson the issue of conveying information about the underlying charges to the California Commission on Teacher Credentialling (CCTC), notwithstanding Zamvil's resignation.

Gallenson also told Merchat he had authority to enter into a resignation agreement on behalf of Zamvil. He

faxed the agreement to Zamvil on the afternoon of November 4 and spoke with Zamvil "a number of times" during the week before they signed the agreement on November 5 (Gallenson) and November 6 (Zamvil). According to Zamvil's testimony, he did not claim that Gallenson inadequately advised him concerning the terms of the resignation agreement before Gallenson signed it on his behalf. Moreover, Gallenson testified to his own understanding of all aspects of the agreement.

In addition, although Winslow played a lesser role, she, too, was involved in settlement discussions. For example, Winslow discussed with Henry what type of recommendation the District would provide to prospective employers. As well, they covered the merits of the case from Henry's perspective, allegations of drug use by a former student and the issue of relaying information to the CCTC. Henry faxed to her several declarations filed in Zamvil's dissolution action that indicated drug use on his part.

Thus, contrary to Zamvil's assertions, the record demonstrates that Zamvil had the assistance of competent, informed counsel during the settlement process.

2. *Representation at the Administrative Hearing*

Zamvil argues nonetheless that his distress was compounded by the fact that he did not have an attorney to represent him in the upcoming administrative hearing, and the court did not allow Gallenson to testify that he had a calendar conflict. First the court cut-off this testimony on relevancy grounds because Gallenson had just

testified that he made a special appearance in the case. Second, when asked whether his representation in the administrative proceeding was conditioned on the administrative law judge granting a continuance, Gallenson asserted the attorney-client privilege. Then, after the court prodded him to just "[t]ell us what your relationship to the plaintiff was in this case," the question of a conditioned representation was reasserted and Gallenson gave a nonanswer. Third, Zamvil himself wrote to the administrative law judge on November 4 that he had Gallenson's tentative agreement to represent him at the administrative hearing. Zamvil testified that the tentative agreement was "[c]onditioned upon getting a continuance."

Further, Zamvil moved for a continuance in the administrative proceeding and in superior court; both motions were denied. The denials of continuance by the administrative law judge and the superior court[3] on November 3 and November 5 respectively are not a basis for rescission. As the trial court indicated, if Zamvil felt he could not go forward without a continuance, he should have sought a writ before November 8. Although it would have been tight, a writ petition could have been prepared in advance and filed immediately after the November 5 denial of continuance or stay. Zamvil had the assistance of counsel during this period. It was up to

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[3] Although we do not have copies of anything relating to the November 5 ex parte hearing in superior court, it appears from the briefs that the hearing was on a motion for either a continuance or a stay.

them to advise Zamvil of these procedures prior to signing the resignation agreement.

3. Drug Use Allegations

Zamvil further asserts that the court wrongfully precluded testimony about "one of the most distressing of circumstances. The Court would not let plaintiff testify that Johnson's name was given to him on November 3, 1993, as a witness who would come forth and testify that Zamvil used drugs with a student. . . . Nor was he allowed to testify that he had no means of finding Johnson." Contrary to his assertion, both Merchat and Zamvil testified to Zamvil's knowledge of Johnson as a potential witness on November 3. Additionally, as to the objection that the court impermissibly prevented Zamvil from testifying that he had no means of locating Johnson, Merchat testified that neither Bertoli nor Gallenson nor Zamvil ever requested the identity of the District's drug witness.[4] Moreover, Bertoli told Merchat *not* to obtain a statement from Johnson, the inference being that such information would have to be made available to the CCTC. Finally, Zamvil was permitted to testify that he had "[v]ery great concern" about introducing evidence at the administrative hearing related to alleged drug use. He explained that such evidence, true or false, would end up being very prejudicial and he would end up "losing the credential. . . . " He said when he heard about Johnson as a potential witness, he became upset, the news "set me into

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[4] Apparently Winslow asked Henry if he could identify the student by name, but Henry did not know the name at that time.

a panic . . . " He was frantic "[t]hat somebody could come up with this outrageous stuff." This development caused him to lose sleep.

Henry shared his thinking about the possibility of introducing the drug use information at trial with both Winslow and Gallenson, even though the allegations went to conduct occurring beyond the four-year statute of limitations. Henry indicated he was assessing whether to amend the statement of charges, pending further research and review of the information. The statement of charges was never amended. If Zamvil and the attorneys assisting him thought that a continuance was needed to conduct further discovery in light of the potential new witness, a continuance for good cause could have been sought in the administrative proceeding itself. (See Gov. Code § 11524.) No one sought a continuance on this basis and Zamvil cannot now complain about the timing of the dismissal hearing vis a vis learning of the potential student witness.

D. Best Evidence

Investigator Fitzgerald made notes of his interviews with ex-student Johnson. Johnson testified that Fitzgerald asked him to review those notes and sign a statement verifying their accuracy. Johnson wanted to make some changes to the notes and add a statement. Johnson testified that he asked Fitzgerald if he would leave the statement for him to review, and asked if he could modify it; Fitzgerald refused. To get rid of Fitzgerald, Johnson signed a statement verifying the accuracy of the notes on condition that Fitzgerald verify one point and revise a

section of the notes that Johnson thought posed a question, but did not include his response. The areas of inaccuracy had to do with Zamvil being at a party, and smoking cocaine or marijuana.

Counsel for Zamvil asked to have Fitzgerald's notes produced as the best evidence of their contents. The trial court denied the motion. Counsel renewed the request when the District asked Fitzgerald whether Johnson asked for certain changes to the notes before verifying their accuracy. Zamvil now charges that the trial court erred to his prejudice in failing to order the notes produced at trial. We disagree.

First, the best evidence rule (now the secondary evidence rule[5]) is only concerned with proof of the contents of a written document. (See Evid. Code § 1520 et seq. and former Evid. Code, §§ 1500-1511, repealed by Stats. 1998, ch. 100, § 1, operative Jan. 1, 1999.) For the most part, the District was not trying to prove the contents of Fitzgerald's notes with parol evidence. Rather, the District was trying to prove Johnson's statements and actions with respect to the notes as well as the fact that he executed the verification. The notes, after all, were purportedly notes of what Johnson said. Johnson, of course, can testify as to what he originally said to Fitzgerald, and to what he told Fitzgerald in terms of the inaccuracy of the notes.

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[5] See California Law Revision Commission Comment, West's Annotated Evidence Code sections 1500 to 1511 (2000 pocket supp.) page 35: "The Best Evidence Rule is repealed and replaced with the Secondary Evidence rule."

Second, to the extent the District did try to prove the contents of the notes[6], the failure to order them produced was not prejudicial. Zamvil contends that inspection of the notes would have helped answer these questions: (1) Did they contain initialing and dating by Johnson; (2) what do the notes indicated Johnson said Zamvil did on conjunction with drugs, if anything; (3) do the notes look more like questions than answers; and (4) do the notes impeach Fitzgerald's testimony about what Johnson told him?

To begin with, Johnson testified that he signed a statement saying the notes were accurate and initialed and dated each page of the notes. His testimony as to what he did is as good as the notes themselves. Next, Johnson testified that he verified the statement: " '[A]ctually saw him snorting cocaine and freebasing in front of students,' " but clarified that he told Fitzgerald "it looked like he had written down the question, not my response." From this the trial court found that Johnson verified that he told Fitzgerald "*that he* saw Mr. Zamvil snorting cocaine and freebasing cocaine with students in 1983." (Italics added.) While we agree that a perusal of the notes would have clarified their structure, i.e., whether some parts looked more like questions than answers, not having the notes was not prejudicial.

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[6] For example, counsel for the District did ask for confirmation of the contents of the notes when he asked Johnson: "And one of the statements in those notes that you verified is, 'actually saw him snorting cocaine and freebasing in front of students,' correct?"

Ultimately, Fitzgerald's notes could only be relevant to the issue of whether the District acted in bad faith in relying on Fitzgerald's findings to relay drug allegations to Zamvil's attorneys in order to intimidate him into resigning. Whether the notes were accurate or not, what is important is that Fitzgerald informed the District that he had identified a former student who had alleged Zamvil used drugs in his presence. The District corroborated the drug use allegations with three declarations from Zamvil's dissolution indicating his drug usage. Regardless of Fitzgerald's competency or integrity in interviewing Johnson and preserving his observations, there was no evidence indicating that the District would have a reason to doubt Fitzgerald's integrity or accuracy as an investigator.

We affirm the judgment.

APPENDIX B

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

KENNETH B. ZAMVIL

v.

PETALUMA JOINT UINON HIGH SCHOOL DISTRICT, et al.
A081951

Sonoma County
Super. Ct. No. 208215

[FILED
Court of Appeal – First App. Dist.
FEB 16 2000
RON D. BARROW, CLERK
By _____
DEPUTY]

The petition for rehearing is denied.

Dated: FEB 16, 2000

HANLON, P.J.

APPENDIX C

First Appellate District, Division Four, No. A081951
S086292

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

KENNETH B. ZAMVIL,
Appellant

v.

PETALUMA JOINT UNION HIGH SCHOOL DISTRICT,
Et al., Respondents.

[SUPREME COURT
FILED
APR 19 2000
Frederick K. Ohlrich Clerk
DEPUTY]

Appellant's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

California Civil Code § 1689

(a) A contract may be rescinded if all the parties thereto consent.

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785 [fn. omitted], 1789 [fn. omitted], 1930 and 2314 of this code, Section 2470 of the

Corporations Code [fn. omitted] Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

* * *

California Education Code § 44932.

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.

(2) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188 of the Statutes of 1919 [fn. omitted], or in any amendment thereof.

(3) Dishonesty.

(4) Unsatisfactory performance.

(5) Evident unfitness for service.

(6) Physical or mental condition unfitting him or her to instruct or associate with children.

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her.

(8) Conviction of a felony or of any crime involving moral turpitude.

(9) Violation of Section 51530 or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

(10) Knowing membership by the employee in the Communist Party.

(11) Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.

(b) The governing board of a school district may suspend without pay for a specific period of time on grounds of unprofessional conduct a permanent certificated employee or, in a school district with an average daily attendance of less than 250 pupils, a probationary employee, pursuant to the procedures specified in Sections 44933, 44934, 44935, 44936, 44937, 44943, and 44944. This authorization shall not apply to any school district which has adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

* * *

California Education Code § 44934.

Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, *the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or suspend him or her at the expiration of 30 days from the date of service of the notice, unless the*

employee demands a hearing as provided in this article. Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or unsatisfactory performance shall specify instances of behavior and the acts or omissions constituting the charge to that the teacher will be able to prepare his or her defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or unsatisfactory performance. . . . [Italics added.]

* * *

California Education Code § 44943.

When an employee who has been served with notice pursuant to Section 44934 of the governing board's intention to dismisss or suspend him or her *demands a hearing, the governing board shall have the option either (1) to rescind its action, or (b) schedule a hearing on the matter.* [Italics added.]

* * *

California Education Code § 44944.

(a) In a dismissal or suspension proceeding initiated pursuant to Section 44934, if a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a

hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. However, the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency in that chapter, *except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court under Article 3* (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure. Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery shall occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to Section 11505 of the Government Code. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this subdivision shall be extended for a period of time equal to such continuance. However, the extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in Section 2034 of the Code of Civil Procedure shall be available to the party seeking discovery and

the court of proper jurisdiction, to entertain his or her motion, shall be the superior court of the county in which the hearing will be held.

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based upon charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings who shall

be chairperson and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board of the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, the failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote, and the commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition which shall be, solely:

(1) That the employee should be dismissed.

(2) That the employee should be suspended for a specific period of time without pay.

(3) That the employee should not be dismissed or suspended.

The decision of the Commission on Professional Competence that the employee should not be dismissed or suspended shall not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial errors.

The commission shall not have the power to dispose of the charge of dismissal by imposing probation or other alternative sanctions. The imposition of suspension pursuant to paragraph (2) shall be available only in a suspension proceeding authorized pursuant to subdivision (b) of Section 44932 or Section 44933.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

(d)(1) If the member selected by the governing board or the member selected by the employee is employed by any school district in this state the member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district, whichever amount is greater.

(e) If the Commission on Professional Competence determines that the employee should be dismissed or suspended, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the administrative law judge. The state shall pay any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the governing board and the member selected by the employee, including, but not limited to payments or obligations incurred for travel, meals, and lodging, and the costs of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of the claims. The employee and the governing board shall pay their own attorney fees.

If the Commission on Professional Competence determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing, including the cost of the administrative law judge, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the administrative law judge, of the member selected by the

governing board and the member selected by the employee, including, but not limited to, payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee.

As used in this section, "reasonable expenses" shall not be deemed "compensation" within the meaning of subdivision (d).

If either the governing board or the employee petitions a court of competent jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

In the event that the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, then either the state, having paid the commission members' expenses, shall be entitled to reimbursement from the governing board for those expenses, or the governing board, having paid the expenses, shall be entitled to reimbursement from the state.

Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the governing board for the expenses, or the governing board, having paid its portion and the employee's portion of the expenses of the hearing, including the cost of the administrative law judge, shall be entitled to reimbursement from the employee for that portion of the expenses.

(f) The hearing provided for in this section shall be conducted in a place selected by agreement among the members of the commission. In the absence of agreement, the place shall be selected by the administrative law judge. [Italics added.]

* * *

California Education Code § 44945.

The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law. [Italics added.]

* * *

California Government Code § 6253.

(a) *Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided.* Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency. . . . [Italics added.]

* * *

California Government Code § 54954.2.

(a) *At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.* A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public. . . . [Italics added.]

* * *

California Government Code § 65960.1.

(a) The district attorney *or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination* that an action taken by a legislative body of a local agency in violation

of Section 54953, 54954.2, 54954.5, 54954.6, or 54956 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.

(b) *Prior to any action being commenced pursuant to subdivision (a), the district attorney or interested person shall make a demand of the legislative body to cure or correct the action alleged to have been taken in violation* of Section 54953, 54954.2, 54954.5, 54954.67, or 54956. The demand shall be in writing and clearly describe the challenged action of the legislative body and nature of the alleged violation. . . . [Italics added.]

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